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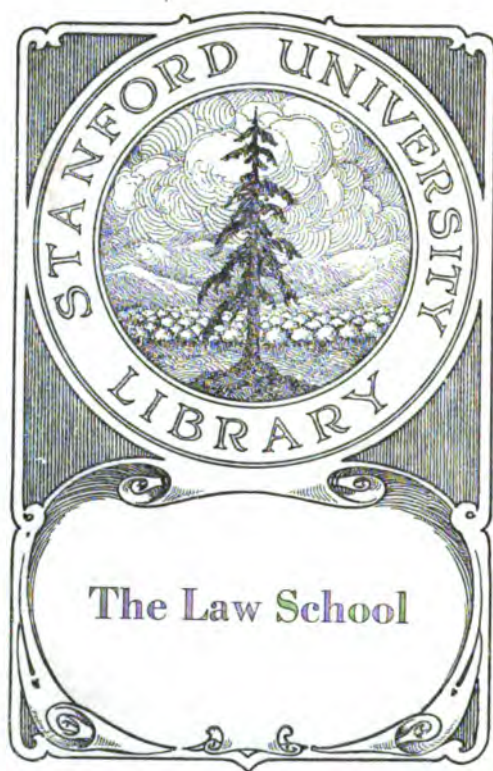
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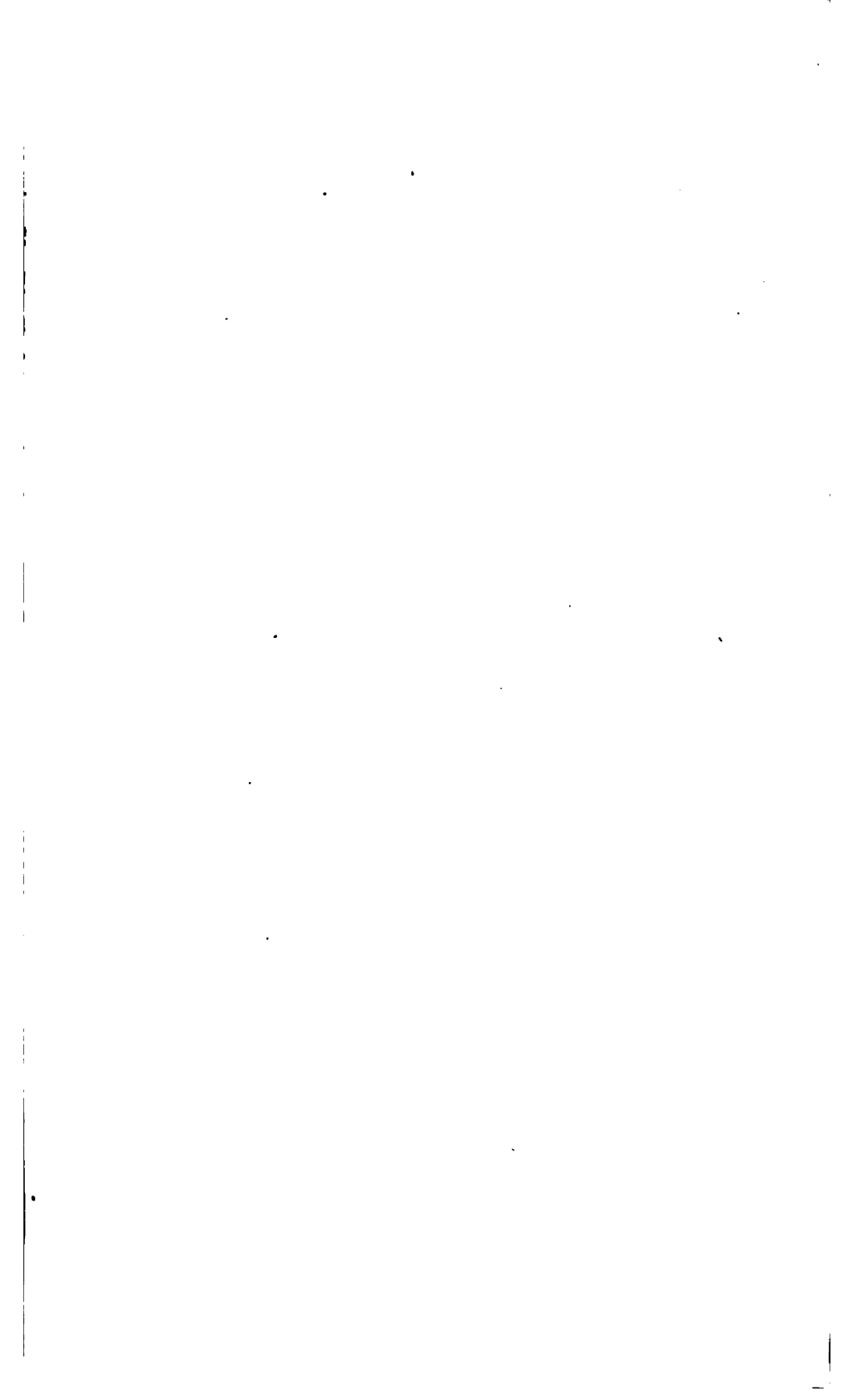
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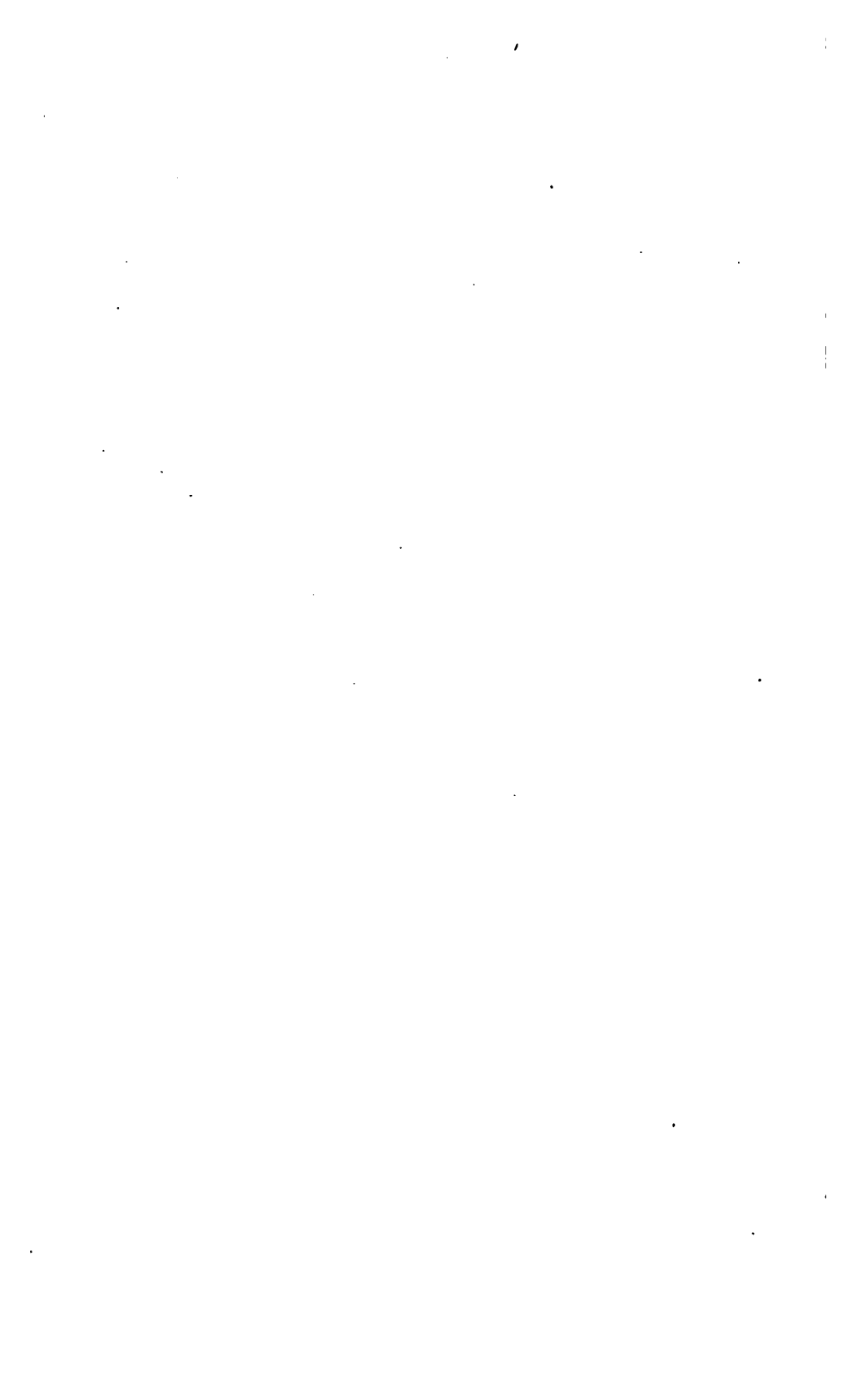
H. I. GILLASPIE.











REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
English Courts of Common Law.

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

Gillaspie

HERETOFORE CONDENSED BY
THOMAS SERGEANT AND JOHN C. LOWBER, Esqrs.,
Now Reprinted in full.

VOLUME IV.
CONTAINING CASES IN THE COMMON PLEAS AND EXCHEQUER CHAMBER,
IN 1813, 1814, 1815, 1816, 1817, 1818, AND 1819.

PHILADELPHIA:
T. & J. W. JOHNSON & CO., LAW BOOKSELLERS;
NO. 535 CHESTNUT STREET.
1871.

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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS;

FROM

MICHAELMAS TERM, 58 GEO. III. 1817, TO HILARY TERM, 59 GEO. III. 1819.

BOTH INCLUSIVE.

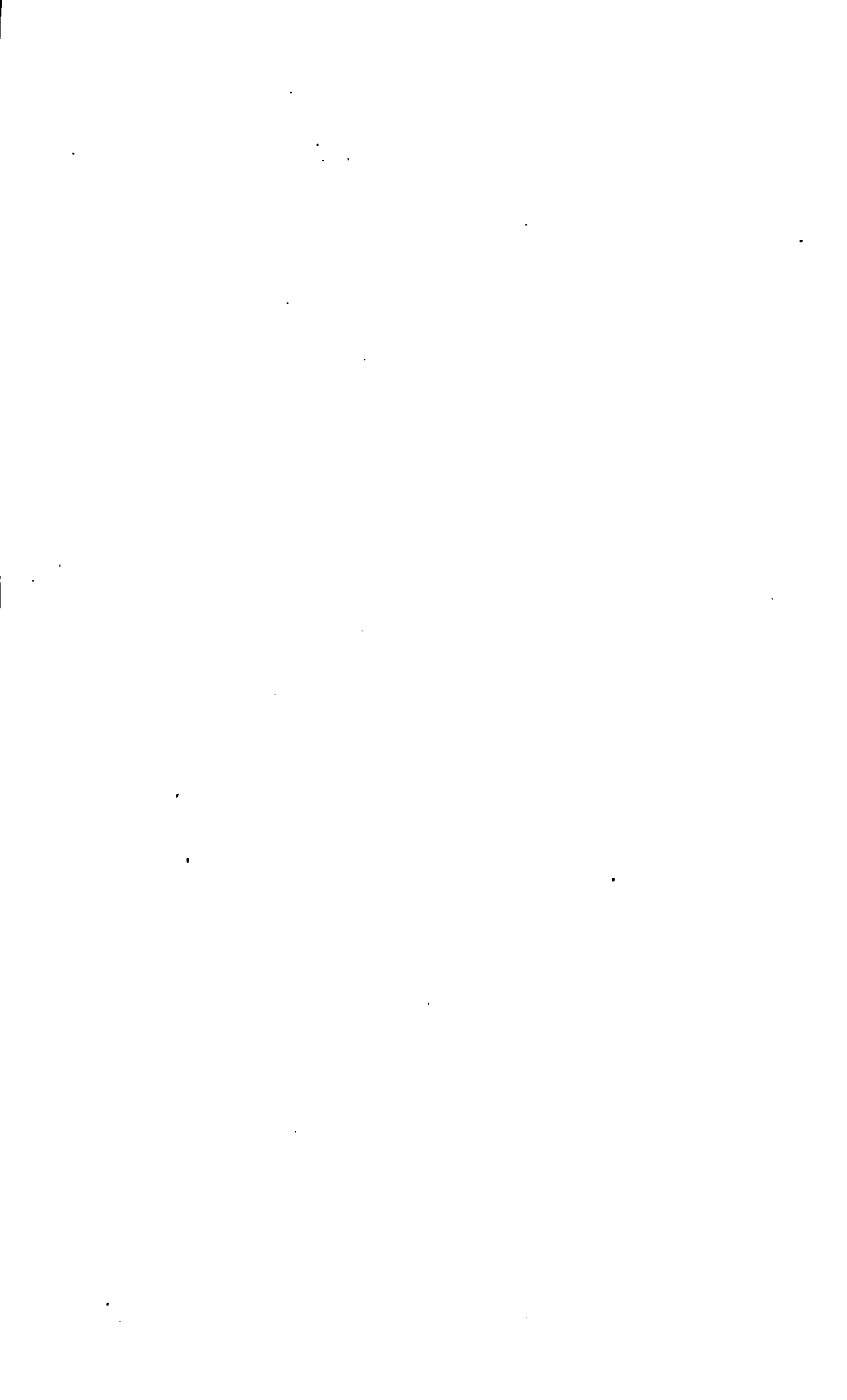
WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

WILLIAM PYLE TAUNTON,
OF THE MIDDLE TEMPLE, ESQ., BARRISTER AT LAW.

VOLUME VIII.

PHILADELPHIA:
T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 535 CHESTNUT STREET.
1871.



J U D G E S

OF THE

COURT OF COMMON PLEAS,

DURING THE PERIOD CONTAINED IN THIS VOLUME.

(Until *Trinity* Vacation, 1818,)

The Right Hon. Sir VICARY GIBBS, Knt. Ld. Ch. J.

(And for the residue of the Period,)

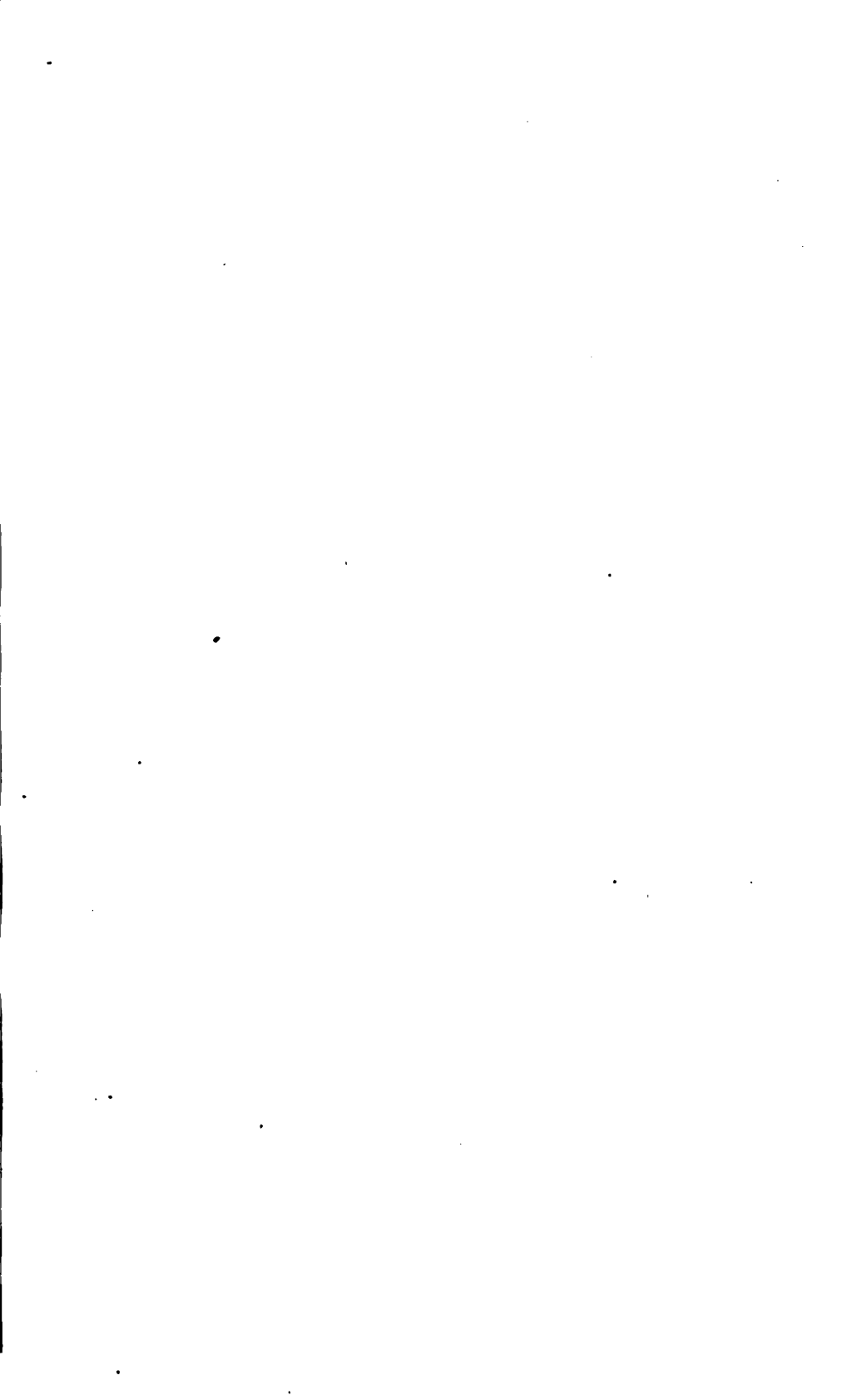
The Right Hon. Sir ROBERT DALLAS, Knt. Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir JOHN RICHARDSON, Knt.

After *Hilary* Vacation, 1818.



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CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS
IN
MICHAELMAS TERM,
IN THE
FIFTY-EIGHTH YEAR OF THE REIGN OF GEORGE III, 1817.

Gillaspie

MITFORD v. ELLIOTT.†

[1 Moore 434. S. C.]

Held, that a reversion to the crown, expectant on the determination of an estate tail, granted by the crown to a subject for services, was not barred by either of two private acts of parliament which had been passed for confirming a settlement of the estate made by the tenant in tail, which settlement purported to bar such reversion, both of those acts containing an express saving of the rights of the crown, but neither of them naming the crown in the body of the act; and the second act vesting part of the settled estate in trustees for sale, with directions to purchase other lands with the produce of such sale, to be settled, in lieu of the lands sold, to the same uses as expressed in the former act. It was also held, that the trustees could not pass a fee simple in the settled lands, which they had sold under the second act, in conformity to the powers therein given to them.

THIS case, sent by the Master of the Rolls for the opinion of this court, stated in substance as follows: King *Henry* the Eighth, being seised, in right of his crown of *England*, of the tenements hereinafter mentioned, *in consideration of the good and gratuitous services performed by his servant Sir *Gilbert Talbot* to him and his father, and to be performed thereafter, did, by a certain grant, duly made in the fourth year of his reign, duly give and grant to Sir *Gilbert Talbot*, his majesty's manor of *Byrfield Abbott*, otherwise *Birfield*, with its appurtenances, in the county of *Berks*, and all his majesty's lands and tenements, rents, reversions, and services, with their appurtenances, in *Birfield* aforesaid, which were in the hands of his majesty, to hold to the said

† *Dallas*, J., was absent during the argument of this case, on account of indisposition.

Gilbert Talbot and the heirs male of his body lawfully begotten, of his said majesty and his heirs, by the service of fealty only."

After this grant was made, the tenements and premises, with the appurtenances, so granted, descended to and legally vested in *Charles Earl* and only Duke of *Shrewsbury*, as heir male of the body of *Gilbert Talbot*. The Duke of *Shrewsbury* died without issue male, and, after his death, an act of Parliament was passed, (6 Geo. 1.) intitled "An act for annexing the late Duke of *Shrewsbury's* estate to the earldom of *Shrewsbury*, and confirming *Gilbert Earl of Shrewsbury's* settlement in order thereto, and for other purposes therein mentioned." By this act, after reciting, that the Duke of *Shrewsbury*, by lease and release of the 30th and 31st of October, 1700, after failure of issue male of his body, and other uses then determined, settled all his manors, messuages, farms, advowsons, rectories, tithes, lands, tenements and hereditaments whatsoever, situate in the several counties of *Berks* and seven other counties named, any or either of them, or elsewhere in the kingdom of *England* or *Ireland*, whereof or wherein he, or any others in trust for him, had any estate of inheritance, to the use of *George Talbot*, third son of *Gilbert Talbot* (the uncle of the said Duke,) for life, sans waste; remainder to trustees to preserve contingent remainders; remainder to the use of the first and other sons of *George Talbot* successively in tail male, and, for want of such issue, to the use of *John Talbot* (eldest son and heir of *Thomas Talbot*, deceased,) for life, sans waste; remained to trustees to preserve contingent remainders; remainder to the use of the first and other sons of *John Talbot* successively in tail male; and, for want of such issue, to the use of Sir *John Talbot* for life, with remainder to the use of his first and other sons successively in tail male; and, for want of such issue, to the use of the Duke of *Shrewsbury*, his heirs and assigns for ever, with power to make jointures and leases as therein mentioned; and, also, reciting, that the Duke of *Shrewsbury*, by his will, dated the 19th of July, 1712, settled certain other manors, land, tenements, &c., in the same manner as the former manors, &c., were settled, and confirmed such former settlement: and, further reciting, that the Duke of *Shrewsbury*, on the 1st of February, 1717, died without issue; whereby the title of Earl of *Shrewsbury*, and the reversion and inheritance of the settled manors, lands, tenements, &c., descended to the Right Honorable *Gilbert* then Earl of *Shrewsbury*, eldest son and heir of *Gilbert Talbot* (uncle of the duke:) and, further reciting, that Sir *John Talbot* died without issue male, in the life-time of the Duke of *Shrewsbury*: and that, by lease and release, dated the 3d and 4th of March, 1718, in consideration of a marriage then intended between *George Talbot* and *Mary Fitzwilliam*, and 1300*l.* portion, *Gilbert Earl of Shrewsbury*, *George Earl of Cardigan*, *William Lord Bishop of Salisbury*, and Sir *John Stanley*, (parties to the release,) according to their respective estates and interests, granted to *Richard Lord Lumley*, *Nevill Ridley*, (also parties thereto, and their heirs, all the manors, freehold messuages, farms, advowsons, rectories, tithes, lands, &c., situate in the counties of *Salop*, *Worcester*, *Berks*, *Chester*, *Stafford*, *Oxford*, and *Wilts*, or elsewhere, in the kingdoms of *Great Britain* and *Ireland*, with certain exceptions:) to hold to them and their heirs, as to the manors, lands, tenements, and hereditaments, in the said counties of *Salop*, *Worcester*, and *Berks*, to the use of *Richard Lord Fitzwilliam* and *George Pitt*, (also parties to the said release,) their executors, administrators, and assigns, for the term of ninety-nine years, if *George Talbot* and *Mary Fitzwilliam* should jointly so long live; upon trust, to raise the clear annual sum of 400*l.* for the said *Mary*, during the said term, for her separate use; and upon further trust, to permit *George Talbot* to receive the residue of the rents and profits during the term: and as to those manors, and all and every other the manors, &c., by the indenture bargained and sold (except as therein is excepted,) to the use of *George Talbot*, for life, sans waste, remainder to trustees, to preserve contingent remainders; and, after his decease, to the use and intent that

Mary Fitzwilliam should receive, out of all the said manors, &c., the clear annual sum of 1500*l.* for life, for her jointure, with power of distress for non-payment thereof, and chargeable therewith, to the use of *Richard* Lord Viscount *Fitzwilliam* and *George Pitt*, their executors, administrators, and assigns, for two hundred years, for the better raising the said rent-charge of 1500*l.*, and securing the same; and after the expiration or other sooner determination of the said term of two hundred years, to the use of the first and other sons of *George Talbot*, on the body of *Mary Fitzwilliam*, to be begotten, in tail male successively; and for want of such issue, as to the said manors, &c., in the said counties of *Worcester*, *Salop*, and *Berks*, to the use of the said *Richard* Lord

*5] Viscount *Fitzwilliam*, Sir *John Webb* (party to the release) *and *George Pitt*, their executors, administrators, and assigns, for five hundred years, sans waste (which term hath since been determined,) upon trust, for raising 20,000*l.*, and maintenance for the daughters of *George Talbot*, on the body of *Mary Fitzwilliam*, to be begotten, in case they should have no issue male; and as to the manors, &c., in the counties of *Worcester*, *Salop*, and *Berks*, from and after the determination of the said term of five hundred years, and also as to all other the manors, &c., therein-before limited, to the use of the first and all other the sons of *George Talbot*, on the body of any after-taken wife, to be begotten in tail male successively; and for want of such issue, to the use of *John Talbot*, of *Longford*, for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the use of the first and other sons of *John Talbot*, in tail successively; in which release there was a power to *George Talbot*, and also to *John Talbot*, when he should be in the actual possession of the manors and premises, to make jointures to any woman they should marry, not exceeding the yearly value or sum of 2000*l.* a year, with power also to lease the said manors, &c., (except as therein excepted) for twenty-one years, or three lives; and reciting, that, after the deaths of *Gilbert* Earl of *Shrewsbury*, *George Talbot*, and *John Talbot*, and failure of issue male of their respective bodies, the title of Earl of *Shrewsbury* would, by virtue of letters patent, by course of descent, and *per formam doni*, come to *William* Bishop of *Salisbury*, and the heirs male of his body; it was thereby agreed, that *Gilbert* Earl of *Shrewsbury*, *George Talbot*, *William* Bishop of *Salisbury*, and *Charles Talbot*, should apply for obtaining a private act of parliament, for settling the said manors, &c., on *William* Bishop of *Salisbury*, and the issue male of his body, after the death of *Gilbert* Earl of *Shrewsbury*, *George Talbot*.

*6] *and *John Talbot*, and failure of issue male of their bodies, in such manner as should be advised: And further reciting, that the said *Gilbert* Earl of *Shrewsbury* was desirous that the settlement should be further extended, in such manner as was therein-after mentioned, and that the manors, &c., should be annexed to the title of Earl of *Shrewsbury*, in such manner as was therein-after expressed, for the better and more honorable support of the title. It was, at the petition of *Gilbert* Earl of *Shrewsbury*, *George Talbot*, *John Talbot*, *William Talbot* Bishop of *Salisbury*, and *Charles Talbot*, son and heir apparent of the Bishop, *Edward Charington* and *Henry Talbot*, younger sons of the said bishop, enacted, that the recited indentures of lease and release, bearing date the 3d and 4th of *March*, 1718, should be thereby ratified and confirmed: and that *George Talbot*, and his first and other sons, and the heirs male of their bodies, and *Mary* his wife, and *John Talbot* of *Longford*, and his first and other sons, and the heirs male of their bodies respectively, and all and every other person or persons to whom any use, trust, estate, rent, remedy for the same, or other power or interest, was, by the said recited marriage settlement granted or limited, should be enabled to hold and enjoy the manors and premises, according to the true intent and meaning of the marriage settlement, subject to certain charges; provided that neither the first nor any other son or sons of *George Talbot* or *John Talbot*, or of *Gilbert* Earl of *Shrewsbury*, nor any the heirs male or any such son or sons issuing, nor any other person or persons

his or their heirs male of his or their body or bodies issuing, to whom any estate of inheritance of or in the premises, or any part thereof, should thereafter come, descend, or accrue, by force of that act, who should, within six months after he or they should attain the age of eighteen years, take the oaths and subscribe *the declaration therein mentioned, and who should from thenceforth continue a protestant, until he or they attain the age of twenty-one [7 years, should after he or they should attain the said age, and while he or they should continue protestants, be disabled from aliening, giving, granting, bargaining, selling, or otherwise conveying away the said manors, &c., or any other the premises thereby settled, or any part thereof, but might alien, give, grant, bargain, sell, or otherwise convey away the same, or any part thereof, as freely and absolutely as he or they might have done if that act never had been made. The following saving clause was contained in the act: "Saving also and reserving to our sovereign lord the king, his heirs and successors, and to all and every person and persons, bodies politic and corporate, their heirs, successors, administrators, and assigns, (other than and except the said *Gilbert* Earl of *Shrewsbury*, and his heirs and assigns, the said *George Talbot*, brother of the said Earl of *Shrewsbury*, and the issue male of his body, and the said *John Talbot* of *Longford*, and the issue male of his body,) all such right, title, claim, or demand whatsoever, as they, every or any of them, might, could, or ought to have had, claimed, held, or enjoyed, in case this act had never been made, any thing hereinbefore contained to the contrary notwithstanding."

Another act of parliament was made and passed, 43 Geo. 3., intituled, "An act for vesting part of the settled estates of the Right Honorable *Charles* Earl of *Shrewsbury*, in the counties of *Salop*, *Chester*, *Berks*, *Wilts*, and *Oxford*, in trustees, to be sold, and for laying out the moneys to arise by such sale in the purchase of other lands and hereditaments, to be settled in lieu thereof, to the same uses, and subject to the same restrictions;" whereby, after reciting the former act, and reciting, that the Right Honorable *Charles* *then Earl of [8 *Shrewsbury*, was the heir male of *George Talbot* deceased, on the body of *Mary* his wife, his late grandfather and grandmother, and was entitled to an estate in tail male in possession of the said settled manors and estates, subject to the restriction imposed by the 6 Geo. 1.; and reciting, that on the decease of *Charles* Earl of *Shrewsbury* without issue male, the title of Earl of *Shrewsbury*, and the said manors, &c., would, under the limitations of the indenture of settlement of the 4th of *March*, 1718, and 6 Geo. 1., descend and accrue to the Honorable *John Joseph Talbot*, his brother, and his issue male; and reciting, that certain parts of the estates so settled and limited consisted of undivided shares, and that others were dispersed in many parcels, and lay in a number of parishes and places very distant from each other in the several counties of *Salop*, *Chester*, *Berks*, *Wilts*, and *Oxford*; and that, for the reasons therein mentioned, it would be greatly for the benefit of the said earl, and those entitled in remainder after him, under the limitations in the settlement and the act 6 Geo. 1., if all the estates situate in the counties of *Salop*, *Chester*, *Berks*, and *Wilts*, and certain detached parts of the said estates in the said county of *Oxford*, were sold: and reciting, that it was desirable to purchase and acquire other estates in the counties of *Oxford*, *Worcester*, *Stafford*, and *Chester*, and that powers should be given to sell the estates in the counties of *Salop*, *Chester*, *Berks*, *Wilts*, and *Oxford*, and to lay out the moneys arising by the sale thereof in the purchase of other estates lying in the counties of *Oxford*, *Worcester*, *Stafford*, and *Chester*, or some of them, to be settled as nearly as might be to the same uses as by the said settlement and recited act of parliament were directed and limited, of and concerning the estates thereby settled; it was enacted, on the petition of the said *Charles* Earl of *Shrewsbury*, and *John Joseph Talbot*, that all the manors or lordships, messuages, farms, lands, tithes, *tenements, hereditaments, and premises, and undivided parts and shares thereof, situate in the counties of *Salop*, *Chester*, *Berks*, *Wilts*, and *Oxford*, [9

limited and settled by the indentures of the 3d and 4th of *March*, 1718, and the 6 *Geo.* 1., should, from and after the passing of the 43 *Geo.* 3., be vested in and settled upon *Thomas Wright* and *Charles Conolly*, to the use of them, their heirs and assigns, for ever, freed, released, and discharged, and absolutely acquitted, exempted, and exonerated, of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisos, limitations, and agreements, in and by the indentures of settlement of the 30th and 31st of *October*, 1700, the will of the Duke of *Shrewsbury*, the indentures of the 3d and 4th of *March*, 1718, and the 6 *Geo.* 1., respectively created, limited, provided, and declared, of or concerning the same, *Upon Trust*, that *Thomas Wright* and *Charles Conolly*, and the survivor of them, and his hers and assigns, should, with all convenient speed, with the consent and approbation of *Charles Earl of Shrewsbury*, to be testified by some writing under his hand; and after his decease, then, with the consent of the person or persons who should then be in possession of the said estates respectively, by virtue of the limitations before mentioned, in case such person should then be of the age of twenty-one years, to be testified by him, her, or them, as aforesaid; and in case of the minority of the person so in possession, by the authority of the trustees, sell and dispose of all and singular the manors or lordships, messuages, farms, lands, tenements, hereditaments, and premises, and undivided parts and shares of the same farms, with their appurtenances, either together or in parcels, or by public sale or private contract, unto any person or persons who should be willing to become the purchaser or purchasers thereof, or of any part or parts thereof; and, on

*10] the payment of the purchase money *into the bank, should convey and assure the manors, &c. respectively, unto and to the use of the purchaser or purchasers thereof, and his, her, or their heirs and assigns, respectively, or as he or they should direct or appoint, freed, and discharged, and acquitted, exempted and exonerated, as aforesaid: and it was further enacted, that all the residue and surplus of the moneys arising by such sale, after paying the expenses therein mentioned, should, as soon as conveniently might be, be laid out and invested by *Thomas Wright*, *Charles Conolly*, or the survivor of them, or the heirs of such survivor, by direction of the Court of Chancery, and with the consent and approbation of *Charles Earl of Shrewsbury*, and testified as aforesaid, and, after his decease, then, by and with such other consent as aforesaid in the purchase of freehold manors, messuages, farms, lands, tenements, tithes, or hereditaments, of a clear and indefeasible estate of inheritance in fee-simple in possession; and of such customary or copyhold messuages, lands, tenements, and hereditaments as should happen to be intermixed therewith, or be contiguous thereto, and should not exceed in value one-sixth part of the freehold premises so to be purchased, situate within the counties of *Oxford*, *Worcester*, *Stafford*, and *Chester*, some or one of them and other neighboring counties in *England*, or of some or one of them; and that all and singular the freehold and copyhold manors, &c., which should be so purchased should be settled upon and subject to such powers, provisos, conditions, limitations, restrictions from alienation, declarations, and agreements as those manors, &c., in and by the settlement, and act of 6 *Geo.* 1., did then stand settled and limited, and subject to such of them as should be then undetermined, and capable of

*11] taking effect, or as near thereto as the nature of the estates to be purchased, the *existence of persons, and other contingencies, would admit.

In this act there was also a clause "saving always to the king's most excellent majesty, his heirs and successors, and to all and every other person and persons, bodies politic and corporate, his, her, and their respective heirs, successors, executors and administrators, (other than and except the said *Charles Earl of Shrewsbury* and his heirs male, and the said *John Joseph Talbot*, and his heirs male, and also all and every other person or persons claiming or to claim any estate, right, title, interest, inheritance, use, trust, claim, or demand whatsoever in or out of the several premises hereby respectively made saleable as aforesaid

or any part thereof under, or by virtue of the said several indentures of settlement, or either of them, or the act of 6 Geo. 1., or any of them,) all such estate, right, title, interest, claim, and demand whatsoever, of, in, to, or out of the said premises, and every or any part thereof, as they, every or any of them had before the passing of this act, or could, should, or might have had or enjoyed in case this act had not been made."

After passing the act of the 43 Geo. 3., indentures of lease and release were made, dated respectively the 25th and 26th of July, 1814, the release being between *Thomas Wright* and *Charles Conolly* of the first part, the Right Honorable *Charles Earl of Shrewsbury* of the second part, *Henry Robins*, *John Robins*, and *George Henry Robins*, of the third part; the plaintiff of the fourth part, and *William Stokes*, gentleman, of the fifth part; by which, after reciting in part the act of the 43 Geo. 3., and that *Thomas Wright* and *Charles Conolly* had, with the consent and approbation of *Charles Earl of Shrewsbury*, testified as therein mentioned, contracted and agreed with the plaintiff for the sale of the several pieces or parcels of lands called *Heath's Land*, *situate in the parish of *Shinfield*, in the county of *Berks*, which, by virtue of the said in part last recited act, became vested in *Thomas Wright* and *Charles Conolly*, their heirs and assigns, for the sum of 1257*l.* 18*s.*, including timber growing thereon, and that the plaintiff had paid this sum into the bank of *England*, in the name of the accountant general of the Court of Chancery, and that the same had been there placed, according to the directions of the last mentioned act; it was witnessed, that *Thomas Wright* and *Charles Conolly*, with the consent of *Charles Earl of Shrewsbury*, and at the request of the plaintiff, did, according to their estate and interest therein, grant, bargain, sell, dispose of, alien and release to the plaintiff, the said parcels of land called *Heath's Land*, unto and to the use of the plaintiff, his heirs and assigns, for ever. [*12]

The pieces or parcels of land called *Heath's Land*, comprised in the indentures of lease and release, were part of the hereditaments and premises which were granted to Sir *Gilbert Talbot*, and the heirs male of his body as aforesaid, by the grant of King *Henry* the 8th, and, at the time of passing the 43 Geo. 3, there was issue male of the body of Sir *Gilbert Talbot* in being.

The question for the opinion of the court, was, whether the plaintiff, *Mitford*, was seised in fee simple of the premises called *Heath's Land*, mentioned in the indenture of release, of the 26th of July, 1814.

Pell, Serjt., (with whom was *Lens*, Serjt.,) for the plaintiff. It is clear, that an estate tail of crown lands, granted by the king, in consideration of services, cannot be barred, so as to destroy the reversion to the crown, by a recovery; but the reversionary right to the crown expectant upon an estate tail, not granted by the king in consideration of services, may be barred by a recovery: otherwise, by limiting the ultimate remainder to the crown, *every estate tail might be made a perpetuity. *Wiscman's case*, 2 Rep. 15, and *Cholm-* [*13] *ley's case*, 2 Rep. 50. The first question to be considered is, whether the issue in tail of Sir *Gilbert Talbot* are barred by the estate acts mentioned in the case; and the next is, whether, supposing his issue to be barred by those acts, the outstanding reversion in the crown is also thereby barred? The saving clause in the acts is repugnant to the intent and body of the acts, and, therefore, void;† and it is to be remembered, that, in acts for limiting estates, the intent of the parties to that species of conveyance, (for it is no more,) is to be considered as though such acts were deeds. And in this view of the case, the decision of *Westby v. Kiernan*, Ambler, 697, is material; where tenant in tail, with remainders over, was enabled, by a private statute, to pay debts and charge the estate: there, the saving clause in the act did not except the rights of him in remainder. So, in *Booth's Cases and Opinions*, vol. ii. 400, it is laid down,

† *Alton Wood's case*, 1 Rep. 40. *Ward v. Cecil*, 2 Vern. 711. *Riddle v. White*, 4 Gwill. 1387.

that an estate tail, and all the remainders, and the reversion depending on it, may be barred by a private act, though those in remainder and reversion do not consent thereto. It was the whole object and scope of stat. 43 Geo. 3, to bar, not only the interest which the party had, but also the interest which the crown had. The case has hitherto been considered, as if, by these two estate acts, the whole property had passed away; but it is material, that by the statute 43 Geo. 3, the trustees, who are to sell the estates, are required to purchase other lands, which are to be vested to the same uses as those to which the lands *14] granted to Sir Gilbert Talbot from Henry the eighth, were limited *by the settlement. To that there is a substitution of other lands, for those originally granted by the crown; and the substitution is made with all the rights which attached to the original estate. If, therefore, an estate act do not bar the remainder, what injury is it to a remainder-man, if he is to have one estate in lieu of another and of equal value? The foresight exercised in the approval of acts of this nature is great; and it is not to be contemplated, that any one, who has an interest in such cases, would not be called before the judges previous to that approval. [Gibbs, C. J. The interest of the tenant in tail is not contained in the saving clause; and, though the interest of the crown is excepted in the saving clause, yet, as the interest of the crown depends on the interest of the tenant in tail, the saving clause being so far repugnant to the body of the act, is void. Is there any case, where the interest of the crown has been held an exception to this principle?]

Blosset, Serjt., contra. There are such cases: and it will be necessary to go more widely both into cases and principles. If this had been a reversion in fee to a subject, expectant on an estate tail, it would have been barred; but not on the principle contended for by the plaintiff. This being a case in which the reversion is in the crown, the reversion is not barred by the estate acts; and the rights of the crown, being expressly named in the saving clause, are saved by virtue of the royal prerogative. And, first, let it be considered, what the effect would be if there were no saving clause in these act? A private act of parliament does not bind the rights of strangers, unless specifically named in the act, *Barrington's case*, 8 Rep. 136. In that case the point was decided: in

*15] *Alton Wood's case* there was only the argument *of counsel. *Alton Wood's case* was cited in *Walsingham's case*, Plowd. 547, in which the saving clause was held to be void; not because it was repugnant, but because it was impossible to save any thing out of an estate which no longer existed. In *Riddle v. White*, 4 Gwill. 1394, the counsel said, that they had examined the case in *Dyer*,† and the case in *Brook*,‡ cited by Lord Coke in *Alton Wood's case*, and that they did not support Lord Coke's proposition; the first case being decided on the ground, that the saving therein could not be understood to apply to future titles; and the second on the ground, that saving clauses could only operate on that which was in *esse* at the time of saving, and could not revive services, &c. extinct by forfeiture before the passing of the act. The point left undecided in *Alton Wood's case* was decided in the case of *The Provost of Eton v. The Bishop of Winchester*, 3 Wils. 483. There, the advowson of Kirby Overblowes was vested in the crown in fee by a private act, with a general saving of the rights of all persons, other than those of the crown, the Duke and Duchess of Somerset and their heirs, or any of them. The Duke of Somerset, the settler, had only an estate for life, and the remainder-man was Lord Egremont, and it was there held, even against the crown, that Lord Egremont's remainder was saved by the general saving. In principle, there is no difference between an estate for life, remainder to another, and an estate tail with remainder to the crown; for neither the one nor the other are barrable by common recovery. [Gibbs, C. J. The plaintiff does not contend, that, if a saving clause operates against the general body of the act, such saving clause

† *Beaupre v. Leedes*, 231.

‡ *Tit. Parl. Stat. 77, vide 1 Rep. 47, a.*

void; but, that, where the *body of the act expressly affects the right of a particular person, there, such person cannot avail himself of a general saving clause.] In *The Provost of Eton's* case, nothing could more distinctly affect the remainder than the vesting of a fee in the crown; yet, there the general saving clause was held to protect the remainder. A private statute does, without doubt, operate as a common recovery, and will bar every estate which a common recovery would bar; but, where an estate cannot be barred by a common recovery, there it is not barred by a private act, but is saved by the saving clause. In *Westby v. Keirnan* this distinction is expressly taken by Lord *Aspley*, and that case is different from the case of *The Provost of Eton*, because, in the former, there was tenant in tail; and in the latter only tenant for life. The reversion in fee to the crown cannot be barred by a private act, because it cannot be barred by a common recovery, any more than an estate tail can be barred by a private act of tenant for life, because such an estate cannot be barred by common recovery. Nothing that the tenant in tail in this case can do will bar the reversion in fee to the crown: and it may be conceded that, if an estate tail be created by a subject, with remainder over to the crown, such remainder would not be protected; but that differs widely from a case where the grant is from the crown, in which the reversion is. Every saving clause must protect some right, which would, otherwise, be affected by the general operation of the act: there could not be a greater inconsistency than that which existed between the body of the act and the saving clause in *The Provost of Eton's* case. In *Riddle v. White*, there was an express enactment, that certain lands should be barred of all tithes, with a general saving of the rights of all persons not parties to the act; but the court held, that the rector, though not a party, was barred by the express enactment; which decision *sanctioned something more than a repugnancy between the act and the saving clause, for that amounted to a contradiction. The same doctrine [17 is illustrated in *Ward v. Cecil*. [GIBBS, C. J. 'The Lord Chancellor dealt with *Ward v. Cecil* as a question in equity; and the question was, whether prior creditors by judgments and statutes were postponed to the mortgagee by the act. The Lord Chancellor gave the priority to the mortgagee in equity, but threw out, that the creditors might make use of their priorities as they could at law. In this case, the rights of the crown are never brought before the legislature, either in stat. 6 *Geo.* 1, or in 43 *Geo.* 3. The crown, in fact, is no party to this act; there is not even a recital that the reversion was in the crown; and, as to the position, that the purchased lands are to be settled with reversion to the crown, it is not so, for they are to be settled to the uses of the last antecedent settlement, in which no mention is made of the reversion in the crown. But, if a subject could be barred under these circumstances, the crown cannot be barred, because of its prerogative; even without a saving clause, the crown is not bound by statute, unless named therein.† The crown is not bound by the statute of limitations, by the statutes of bankruptcy, nor by any act, save that were certain wrongs and rights are defined, which need not be here adverted to. *A fortiori*, therefore, the crown shall not be bound by a private act of parliament.]

Pell, in reply. Though strangers are not bound by private acts, that proposition will not affect this case; for there is no stranger here. The issue in tail cannot object to the effect of the estate acts, because they are specifically mentioned in, and parties to the stat. 6 *G.* 1. The lands had descended to *Gilbert Earl of Shrewsbury*, *as issue in tail, and the stat. 6 *G.* 1. was passed on his petition. The opinion of the Lord Keeper in *Alton Wood's* [18 case, 1 *Rep.* 52, *b.*, is decisive, to show that a saving clause, repugnant to the body of an act, is void; nor is the case referred to in *Plowden*, the only case confirmatory of the point; many more might be brought forward, but it is now

† *Plowd.* 240. *Com. Dig.* tit. *Parliament*, R. 8.

too late to discuss that question. Too much is assumed by the defendant, when it is urged, that the Lord Chancellor, in *Ward v. Cecil*, held the rights of the judgment creditors saved; for that judge only decided as in equity, without deciding what would be the effect of a decision in a court of law. *The Provost of Eten v. The Bishop of Winchester*, does not bear out the proposition contended for; the tenancy in that case was for life only; and it was admitted, that, in the case of a tenancy for life, a different construction would prevail. It has been urged for the defendant, that it must be taken for granted, that the interest of the crown had never been regarded, because the crown is not named as a party to the act; but, it is utterly impossible that this fact, of the existence of a reversion in the crown, could be concealed from those who were consulted before the acts were passed. The interest of the issue in tail must, necessarily, have been contemplated; and, in making out the title of the Earl of *Shrewsbury*, tenant in tail, it could not have escaped observation, that the estate originated from the crown, and that there was a reversion in the crown. [*Gibbs, C. J.* Did the Attorney-General, in fact, consent for the crown? The tenant in tail must, necessarily, have been before the judges and consented.] If the consent of the Attorney-General was necessary, it must now be taken, that he was consulted on the part of the crown, and that his consent was given. If he did not appear to give consent, the reason for *19] his non-appearance must have been, that the judges, to whom the act was referred, and the committee, held, that such consent was not called for. But, however this may be, all was cured by the substituted lands being declared to be settled to the same uses as were expressed in the stat. 6 *Geo.* 1. [*Gibbs, C. J.* The substituted lands are to be settled to the uses of the old settlement and act of parliament. Now, by the old settlement, the lands were settled, ultimately, to the use of *Charles Earl of Shrewsbury*, his heirs and assigns for ever. Here is an early settlement and two acts of parliament; by the last act, the early settled lands are to be sold, and other lands are to be bought and resettled to the same uses, but not to the real use which existed, namely, to the use of the crown. The act passed, as if the crown had no interest in it.] The question, then, will be, whether the right of the crown is not saved by the 6th *Geo.* 1.; and if so, the right of the crown to the reversion being kept alive by that statute, is, by reference thereto, preserved in the substituted lands to be bought under the stat. 43 *Geo.* 3. Title under an act of parliament, giving a power to trustees to sell in fee, is *prima facie* a good title: it is said, that such title may be defeated by a reversionary interest in the crown, but the argument *ab inconvenienti* may fairly be pressed home in this case; and the court will pause, before they decide, that a reversionary interest of this sort in the crown, shall be permitted to upset two such estate acts as these.

GIBBS, C. J. The court will take time to consider this case; and if we entertain, ultimately, any doubt on it, we will direct another argument. It is, indeed, a very strong fact in this case, that, in the body of neither of the acts of *20] parliament nor in the settlement is the crown noticed; and it would be very hard to say, that the crown was a party to these acts. We will certify our opinion.

Cur. adv. vult.

The following certificate was afterwards sent:

We have heard this case argued; we have considered it, and are of opinion, that the said *George Misford* is not seised in absolute fee-simple of the said premises called *Heath's Land*, mentioned in the said indenture of release of the 26th of *July*, 1814.†

V. GIBBS.
J. A. PARK.
J. BURROUGH.

† For the decision bearing on this case, see 4 *Cruise Dig.* p. 518, to 544.

RICHARD SHARP SPENCER, Conusor.†

Fine amended by insertion of a name not known to belong to the conusor at the time of passing the fine.

COPLEY, Serjt., moved, that a fine, passed in the 56th year of *George 3.* be amended, by inserting the name of *Sharp*, on an affidavit, which stated, that, at the time of passing the fine, it was not known that *Sharp* formed part of the conusor's name.

By the court.

Fiat.

†Gibbs, C. J., was absent during the whole of this term, in consequence of indisposition.

*KEY et. al., Assignees of ROBINSON et. al., v. FLINT. [*21]

[1 Moore 451, P. C.]

A., previous to his bankruptcy, deposited a bill of exchange with B., for the specific purpose of raising money thereon, and B. advanced money on the bill: Held, that the assignees of A. were entitled to recover from B. the amount of the bill in an action of trover, they having tendered to B. the money advanced by him, though a general balance remained due from the bankrupt to B.; and that this did not form a case of mutual credit within the stat. 5 G. 2. c. 30.

TROVER by plaintiffs, assignees of G. and S. Robinson, bankrupts, for a bill of exchange for 650*l.*, dated 15th of *May*, 1816, drawn by *Geraldes* and Co., upon and accepted by S. Jackson. Plea not guilty. At the trial before Dallas, J., at the London sittings after last term, G. Robinson, (who had obtained his certificate) admitted, that S. Robinson and himself were considerably indebted to the defendant, prior to the bankruptcy; but stated, that the bill in question was given by them to the defendant, not as a satisfaction of their debt, but merely as a deposit for the express purpose of raising money upon it; that the defendant when the bill was so deposited, refused to discount it, but advanced 39*l.* in bank notes, and a check; and on a subsequent day accepted a bill of the bankrupts for 116*l.* which he afterwards paid; and that he promised to make further advances, which he never did. The plaintiffs, before the commencement of the action, demanded the bill from the defendant, and tendered to him 155*l.*, the amount which he had advanced upon it. Dallas, J. under whose direction the jury found a verdict for the plaintiffs, reserved the point, whether the assignees had a right to recover from the defendant, without allowing him the general balance due from the bankrupts; the question being, whether this was a case of mutual credit within the stat. 5 G. 2.†

*Best, Serjt., now moved to set aside this verdict and enter a nonsuit, or to have a new trial. He contended, that, although the bill was deposited with the defendant for the specific purpose above stated, the plaintiffs were not entitled to recover, until the whole amount of the defendant's demands against the bankrupts had been satisfied; and that this was a case of mutual credit, coming strictly within the meaning of stat. 5 G. 2. He cited *Ex parte Decze*, 1 Atk. 228, and *Atkinson v. Elliott*, 7 T. R. 378, wherein *Ex parte Prescott* was cited, observing that no subsequent decision had overturned these cases, or

† c. 30, s. 28., whereby it is enacted, that where it shall appear to the commissioners that there has been mutual credit, or that there have been mutual debts between the bankrupt and any other person, before the bankruptcy, the commissioners or assignees shall state the account between them, and one debt may be set against another, and the balance only of such account shall be paid on either side.

narrowed the doctrine laid down by *Grose* and *Lawrence*, Justices, in the latter case; for that the case of *Staniford v. Fellowes*, 1 Marsh. 184, was decided on a collateral point; namely, that one of the partners had not been made a bankrupt. He also cited *Smith v. Hodgson*, 4 T. R. 211. *Dallas*, J. observed, that these cases were collected in the case of *Olive v. Smith*, Ante, V. 56, which was now cited, and that in *Atkinson v. Elliott*, the form of action was *assumpsit* with a set-off.] *Best* contended, that *Ex parte Deeze* recognised the principle which he now sought to establish. There the packer, as soon as he had packed the goods, was bound to return them; but the court held, that he was entitled to retain them, not only till the price of packing, but also till all other debts due to him from the bankrupt were satisfied. Here the bill was deposited with the defendant for the purpose of raising money: and it would counteract the beneficial effects of the stat. 5 G. 2, if the plaintiffs were to recover in this case; for the commissioners are not to look to one single transaction, but to consider the whole of the accounts between the parties, and find what debts may be due on either side.

*23] *DALLAS*, J. This did not appear to me at the trial to be a case of mutual credit; by which expression I understand something different from mutual debts. Mutual credit must mean mutual trust; now this attempt of the defendant appears to me a gross breach of trust. The bill of exchange which forms the subject of the present action was entrusted to the defendant for a specific purpose, with an express understanding, that it was not to go into the general account. This appears by the evidence given by the bankrupt at the trial, which was, that he obtained this bill from one *Carlos*, and gave for it two notes, drawn by himself and his partner; that he applied to the defendant, either to discount it, or to advance money on it; that the defendant refused to discount it, but advanced 155*l.*, promising to make further advances, which promise he never fulfilled; that the bill was not left on the general account, but, for the express purpose of having money advanced; that, on an application for the bill previously to the bankruptcy, the defendant said that he had parted with it on having raised 300*l.* or 400*l.* upon it; and that the bankrupts had given the defendant no authority to pledge the bill, which he held only as a security for the sums advanced. On these facts I directed the jury to find a verdict for the plaintiffs; and I now think that the doctrine contended for by the defendant would be an exposition of the statute to the encouragement of fraud, and to the destruction of all its beneficial effects.

PARK, J. I am of the same opinion. I can see no color for disturbing this decision of my brother *Dallas*.

BURROUGH, J. I entirely agree with my brothers. The assignees, having *24] tendered the amount of the sums advanced by the defendant, were, under the circumstances of this case, entitled to recover.

Rule refused.

MUSGRAVE et al., Assignees of MOSES MEDEX, a Bankrupt, v. ISAAC MEDEX.

On the dissolution of partnership between *B.* and *C.*, *C.* filed his bill in equity against *B.* for an account, *A.* admitted that he owed a balance to the house of *B. & C.*, and was made a defendant in the suit in equity. *C.* applied to the Court of Chancery for a writ of *ne exeat regno* against *A.* for a much larger sum than that admitted, alleging that to be the balance due to the house of *B.* and *C.* The court granted the writ for the smaller sum only; and *A.* was, accordingly, held to bail for the smaller sum which he paid into court. *B.* became bankrupt. The assignees of *B.*, *C.* being one of them, arrested *A.*

for the larger sum. This court refused to discharge *A.* out of custody, on the ground that this case did not come within the principle *nemo debet bis vexari pro eadem causa.*

THE defendant, in this case, had been resident at *Gibraltar*, receiving consignments of goods from the co-partnership of *Musgrave* and *Moses Medex*, for sale. This co-partnership was dissolved in *June*, 1814; and, thereupon, *Musgrave* filed a bill in chancery against *Moses Medex*, for an account of the co-partnership concern; and, a receiver having been appointed, the defendant, shortly after his arrival in this country from *Gibraltar*, in *August*, 1814, delivered to the receiver an account of sales consigned to the defendant, together with an account current between the defendant and the co-partnership; by which it appeared, that a balance of 350*l.* sterling was due from the defendant to the partnership. Shortly afterwards, the defendant was made a defending party to the suit instituted by *Musgrave*, who applied to the Court of Chancery for a writ of *ne exeat regno* on an affidavit, which stated the accounts between the defendant and the co-partnership, and made the defendant debtor to the co-partnership, *to the amount of 3387*l.* 1*9s.*, being the balance of the [*25 accounts, as therein stated. The court refused to grant the writ for any larger sum than the balance admitted to be due by the defendant, namely, the sum of 350*l.*, for which sum the defendant was accordingly arrested and held to bail. The defendant gave bail for this sum, and, in the progress of the suit, the money was paid into court, whereby the defendant discharged himself from all money due to the co-partnership. The defendant filed his answer to the suit, in *August*, 1815; and *Musgrave*, after that time, took no steps in the suit. *Moses Medex* became bankrupt in *March*, 1817. No application had been made on behalf of the assignees, of whom *Musgrave* was one: but, on the 27th of *September* following, the defendant was arrested at the suit of the assignees, for 4000*l.* and upwards, for money had and received by the defendant for the use of the co-partnership of *Medex* and *Musgrave*, that being the same sum on account of which the writ of *ne exeat regno* was applied for.

Best, Serjt., now moved, that the defendant should be discharged out of custody, on the ground that *Musgrave*, having before applied for a writ of *ne exeat regno*, for this same sum, the rule of law *nemo debet bis vexari pro eadem causa* applied.

Sed per curiam. That principle does not apply to this case. In order to make the proceeding vexatious, it must clearly appear, that the cause of action is the same with that on which former process has been had. A motion to set aside proceedings in this court, on account of a suit pending in equity, was never granted. The plaintiff claims the whole sum in equity as well as at law, and the writ was granted *diverso intuitu*. No *ground is disclosed to [*26 us, on which the party ought to be discharged.

Rule refused.

HINDLE v. BIRCH and HEYGATE, Sheriff of MIDDLESEX.

[1 Moore. 455. S. C.]

After trial, an affidavit, tending to impeach a verdict by stating corrupt motives in one of the jurors, cannot be received.

ACTION against the sheriff, for taking insufficient sureties on a replevin bond. At the trial, before *Park, J.*, at the *London* sittings after last term, contradictory evidence, as to the sufficiency and solvency of one of the sureties, was left to the jury, for their determination, by the learned judge: who stated, on the authority of *Hindle v. Blades*, Ante, V. 225. *S. C.* 1 *Marsh.* 27, that if the

sureties were apparently responsible, that was sufficient to discharge the sheriff. The jury found a verdict for the plaintiff.

Vaughan, Serjt., now moved to set aside this verdict, and have a new trial, on two grounds; first, because the verdict was against evidence; and, secondly, on an affidavit of a sheriff's officer, which stated, that after the trial, one of the jurymen said to him, "One of your brother officers lately was served out, in an action of *Hindle's*: he played me a dirty trick once, and I was determined to give him a lift whenever I could." He admitted, that it had been decided that the court would not admit the affidavit of a jurymen, to show that the verdict proceeded on corrupt grounds, *Vaise v. Delaval*, 1 T. R. 11, but urged, that the court would receive such information from another source.

*27] *DALLAS, J. On the first point, there can be no ground for application to the court. The question was a mere question of fact for the determination of the jury, and they have disposed of it. Then, as to the second point, I know of no instance, in which the loose declaration of a jurymen, made after trial, has been received, to draw into question a verdict, to which he has been a party; no instance is adduced, in which such an affidavit as that now before us has been received; nor do I believe that such an affidavit ever has, in any case, been received. If such an attempt should be sanctioned, it would be of the worst precedent; for it would tend to draw the administration of justice into disrepute.

PARK, J., after speaking to the merits of the case, expressed himself to be of the same opinion.

BURROUGH, J. It would be of the most serious danger, if any nonsense which a jurymen chooses to utter could be afterwards received to impugn the verdict, which he has joined in giving. I am totally adverse to such a motion; and, in the strongest way, oppose the granting of the rule.

Rule refused.

WHITE, Demandant; GREGORY, Tenant; HERNE, Vouchee.

Recovery amended by inserting an omission in the name of the vouchee.

COPLEY, Serjt., moved to amend this recovery, in which *Peter John Everett Buckworth Herne* was vouched to warranty, his name being *Peter Sone John Everett Buckworth Herne*, by inserting the omission.

By the court,

Fiat.

*28]

*THACKERAY et al. v. TURNER.

[1 Moore. 457. S. C.]

A. sued out a *ca. sa.* against B., who, having put in bail, became bankrupt and obtained his certificate; A., in about two months afterwards, signed an agreement to accept a composition from B., provided all his creditors would accept the same; a few days after the signature of the agreement by A., execution was levied by him on B.'s bail: Held, that the *ca. sa.* against the principal, and all the proceedings against the bail, must be set aside; but that, as the bail had so long delayed their application, they could only be relieved on payment of costs.

THE defendant was arrested at the suit of the plaintiffs in *Trinity* term, 1816, whereupon special bail was put in. On the 19th of *November* in the same

year, the defendant became bankrupt. A certificate granted by his creditors dated the 4th of *January*, 1817, was left for allowance on the 8th, on which day notice was given in the gazette; the certificate was allowed on the 21st of *April* following. By an instrument dated the 10th of *April*, 1817, but not signed by the plaintiffs till the 14th of *June* following, (various creditors having come in from time to time between the two last-mentioned dates, and the plaintiffs not having come in till the 14th of *June*,) an agreement was entered into by the principal part of the defendant's creditors to accept the sum of 10*s.* in the pound on their respective debts, if paid on or before the 10th of *July* then next; provided, that all the creditors would accept the same, and receive at the same time, the defendant's note, at two years, for the remaining 10*s.* On the 21st of *June* an execution was levied on the bail for 123*l.* 9*s.*, the amount of the damages and costs in the action; which sum was paid by the bail. A writ of *ca. sa.*, tested the 12th of *February*, 1817, was issued against the defendant on the 23d of *April*, and delivered to the sheriff on the 25th. To the first *ca. sa. nihil* was returned. The first *sci. fa.* against the bail was tested on the 7th of *May*, issued on the 8th, and lodged with the sheriff on the 9th; the second was tested and issued on the 19th of *May*, returnable on the morrow of *Trinity*, which was the 2d of *June*; and lodged with the sheriff on the 20th: and the appearance day was the 6th of *June*. *Judgment was signed against the [29] bail on the 13th of *June*.

Lens, Serjt., now moved to set aside the writ of *ca. sa.* with all proceedings thereon; and also all proceedings against the bail; and to have the sum of 123*l.* 9*s.* levied on the bail, returned, on two grounds. First, because, the certificate being complete on the 21st of *April*, all subsequent proceedings had to fix the bail were nugatory. Secondly, because the plaintiffs, (although judgment was signed on the 13th of *June*,) had, at an earlier period, entered into a contract to take 10*s.* in the pound. And he urged, that although no time was, in point of fact, given, the plaintiffs had, by that agreement, discharged the bail.

Hullock, Serjt., shewed cause in the first instance. As to the first ground, in order to discharge the bail, it is necessary to show that, when the agreement for giving the principal further time was entered into, the bail were not fixed; and that their situation was altered by such a proceeding. If a principal were to give a warrant of attorney for payment by instalments, the bail would be discharged, because they would be thereby prevented from surrendering their principal, who would also be saved harmless until default in payment of the instalments; but there is no case in which bail has been held entitled to enter an *exoneretur*, where they were fixed at the time when an agreement was entered into between a plaintiff and their principal. In *Thomas v. Young*, 15 East, 617, the bail were held to be discharged, because their situation was altered; for the same reason were they held entitled to their discharge in *Bowsfield v. Trower*, Ante, iv. 456; and though the agreement is dated the 10th of *April*, it was *not executed by the plaintiffs till the 14th of *June*; when the bail were fixed, having lost the time allotted to them to surrender their principal. [30] [*Burrough*, J. At the end of four days *ex gratia* after the return of the writ of *capias ad satisfaciendum* the bail are fixed.] The bail, therefore, were fixed here, and in no case which can be cited will the bail be found to have been fixed. In the next place, it does not appear that the bankrupts ever performed the terms of the agreement; which was, that the plaintiffs should accept 10*s.* in the pound, provided all the creditors would accept the same. [*Burrough*, J. This fact is as clear for you as the other is against you.] There certainly is some difficulty on the former fact, since the cases of *Munnin v. Partridge*, 14 East, 599, and *Willison v. Whitaker*, Ante, vii. 53. *S. C.* 2 *Marsh.* 383; but, in both cases, the bail were only relieved on payment of costs. *Brickwood v. Annist* is nearly in point to prove, that, if a creditor, having sued

† Ante, v. 614. *S. C.* 1 *Marsh.* 250.

out a *ca. sa.* against a principal, offer to accept a composition, if his other creditors would accede to it, and give him time to make terms to such creditors, the bail is not discharged on failure of such composition.

Lens, Serjt., as to the costs, contended, that the notice in the Gazette having been so early as *February*, the plaintiffs had proceeded since in mere despite; and that, after such a delay, they were not entitled to their costs. But,

The *court*, under the circumstances of delay attending this application on behalf of the bail, relieved them by making the

Rule absolute only on payment of costs.

*31]

*SELLERS *v.* BICKFORD.

[1 Moore 460. S. C.]

To debt on bond conditioned, that the defendant should not open a shop within a certain distance of premises demised to him by the plaintiff, the defendant pleaded the leave and license of the plaintiff: Held, that such plea was bad, on general demurrer.

DEBT on bond, whereof the condition, (after reciting that the defendant had by indenture between the parties, for the considerations therein mentioned, sold and assigned to the plaintiff a lease, made between *Gaskell* and the defendant, of the messuage and premises thereby demised, situate in *Tottenham Court Road*, then in the defendant's occupation, for the residue of the term of years by that lease granted; and all the defendant's interest in, and good-will or custom belonging to his trade or business of a general shopkeeper, and dealer in coals, carried on by him in the said messuage and premises,) was, that the defendant should not at any time or times thereafter, by himself, or by any other person or persons, for or on his account, or for his use, benefit, or behoof, open, keep, hold, or maintain, or cause or procure to be opened, held, kept, or maintained, a shop in the chandlery line, or as a general shopkeeper, or dealer in coals, wholesale or retail, or otherwise, in *Tottenham Court Road*, or within the distance of three quarters of a mile from the said shop and premises in *Tottenham Court Road* aforesaid. Breach, that the defendant did on his own account open, hold, keep, and maintain a shop as a dealer in coals in *Tottenham Court Road*, within the distance of three quarters of a mile from the said shop and premises. The defendant pleaded, that he the defendant, by the leave and license of the plaintiff, did, on his own account, open, hold, keep, and maintain, a shop, as a dealer in coals, in *Tottenham Court Road* aforesaid, within the distance of three quarters of a mile from the said shop and premises. Demurrer and joinder.

*32] *Blosset*, Serjt., in support of the demurrer. The question is, whether an obligation by deed can be altered or discharged without deed. If one make a promise, he, to whom the promise is made, may, before breach, discharge it by parol; but, after breach, no discharge, save by deed, is good, *Com. Dig. Assumpsit*, tit. G. Accord and satisfaction cannot be pleaded before breach, without deed, for it enures as a release of the covenant, *Roberts v. Stoker*, Palmer, 110. After breach, accord and satisfaction may be pleaded without deed, for that is not in discharge of the covenant, but of the breach only, *Peytoe's case*, 9 Rep. 77, *Blake's case*, 6 Rep. 44. The license here pleaded is, in effect, a discharge of the covenant after breach, otherwise than by deed. In *Littler v. Holland*, 3 T. R. 590, which is in point, Lord *Kenyon* mentions an action brought by *Garrick* against *Barry*, where it appeared, that the plaintiff, as manager of a theatre, had given the defendant a parol license to be absent; but, as the articles, on which the action was founded, required such a

license to be in writing, the court held, that the parol agreement was no answer to the action. If there be a covenant not to assign, a parol license does not discharge the lessee. *Roe, dem. Gregson v. Harrison*, 2 T. R. 425; nor can a parol agreement to waive an award be pleaded to an action on an arbitration bond, *Braddick v. Thompson*, 8 East, 344; for the defendant shall not plead a collateral agreement by parol to invalidate a claim arising on deed, his only remedy being by a cross action. In *Fortescue v. Brograve*, Styles, 8, the defendant, to an action for breach of covenant, pleaded a subsequent parol agreement, and the plea was held bad. *Blemerhasset v. Pierson*, 3 Lev. [*33] 234, and *Hayford v. Andrews*, Cro. Eliz. 697, show that where a parol agreement to defer payment of the money due on a bond, is pleaded, such plea will be bad. The covenant not to assign without writing is introduced into leases, for the express purpose of enabling the lessor to license an assignment, without a release or deed.

Onslow, Serjt., *contra*, admitted, that, as the cases were settled, he could not say that the condition was void; he was proceeding, but the court interposed.

DALLAS, J. We have not a grain of doubt upon this case. To argue with effect, the defendant must contend that a covenant that is an obligation by deed, can be discharged without deed by license in writing. *Braddick v. Thompson* is in point; and *Thompson v. Brown*,† lately decided in this court, governs the present case.

Judgment for the plaintiff.

† Ante, vii. 656. S. C. 1 B. Moore, 358.

HARVEY v. GOODFORD.

[1 Moore 464, S. C.]

A declaration was delivered on the essoign day of *Hilary* term, and an imparlance to *Easter* term was obtained by the defendant. In that term a rule to plead was given, but no demand of plea was made. The plaintiff having, in *Trinity* term, signed judgment as for want of a plea: Held, that the judgment was irregularly signed, that all the proceedings thereon must be set aside, and all further proceedings be stayed.

A WRIT of *capias ad respondendum* had issued against the defendant, returnable in *Michaelmas* term last. The declaration was delivered on the 29th of *January*, the essoign day of *Hilary* term, indorsed to plead within the four first days of that term; when it was objected to, as being *too late for a plea of that term, and returned to the plaintiff's attorney. On the 21st [*34] of *January* the declaration was again delivered, when an imparlance till *Easter* term was obtained. In that term a rule to plead was given, but no demand of plea was made; whereupon, on the first day of last *Trinity* term, a second rule to plead was given. On the 9th of *June*, a demand of plea was made, and on the following day judgment was signed.

Pell, Serjt., on a former day had obtained a rule *nisi* to set aside the judgment in this case, and all proceedings thereon for irregularity, with costs; and also to stay all further proceedings.

Onslow, Serjt., now showed cause against the rule, contending that, under these circumstances, the plaintiff was entitled to judgment. But

The court, on communication with their officer, held, that the judgment was irregularly signed; for, the declaration being delivered on the essoign day of *Hilary* term, it was too late for a plea of that term; the defendant, therefore, had an imparlance to *Easter* term, when the plaintiff failed to demand a plea, but signed judgment as of *Trinity* term. They, therefore, made the rule

Absolute.

*HOLMES v. BLOGG.

[1 Moore. 466. S. C.]

Plaintiff, an infant, entered into partnership with an adult. The partners took a lease of premises from the defendant, for the purpose of carrying on their trade; the premium for which lease was paid for, half by the infant in cash, and the other half by bills drawn by the defendant and accepted by the plaintiff, in the joint names of himself and partner. The infant, the day after he became of age, dissolved the partnership; and four months after such dissolution, the defendant sued the adult partner alone on one of the bills, accepted a surrender of the lease from him, abandoned his action, and destroyed the other bills: held, that these facts ought to have been left to the jury to determine whether the defendant had not dispensed with formal notice and disaffirmance of the contract, and that the plaintiff had been improperly nonsuited.

ASSUMPSIT for money paid to the defendant by the plaintiff, during his infancy. The declaration consisted of the common money counts. Plea, the general issue. At the trial, before *Park, J.*, at the *London* sittings after *Easter* term, 1817, it appeared, that in *March*, 1816, the plaintiff had entered into partnership, in the trade of shoe-making, with *Taylor*, an adult; and, for the purpose of carrying on that trade, the partners took a lease of certain premises from the defendant. The lease purported to be granted by the defendant, in consideration of 315*l.* paid by the plaintiff and *Taylor*, the receipt whereof from the plaintiff and *Taylor*, was indorsed on the lease. Of this sum, 157*l.* (the money, to recover which this action was brought) was paid down by the plaintiff, in the presence of *Taylor*; and bills were drawn by the defendant for the remainder of the sum, and accepted by the plaintiff, in the joint names of himself and his co-partner, *Taylor*. The first of these bills was payable at four months. At the time of these transactions, the plaintiff was an infant; he became of age in *June*, 1816, and, on the day following that event, he dissolved the partnership with *Taylor*; but his name remained over the door for three weeks afterwards. In *September*, 1816, *Taylor*, entered into a new arrangement with the defendant, by which he got a remission of part of the rent, and the taxes were paid for him by the defendant. When the first bill became due, it was dishonored, and the defendant sued *Taylor* alone; who compromised the action *36] without the knowledge of the *plaintiff, by surrendering the lease to be cancelled. The bills not due were then destroyed. A book kept by the plaintiff, containing particulars relative to the partnership account, was produced; wherein the sum in question was entered in his own handwriting, amongst other payments made by him, as a payment on account of the partnership. *Park, J.*, was of opinion, that this money having been paid upon a partnership account, could not be recovered back by one of those partners, on whose account the payment was made; but, independently of that, expressed himself to be of opinion, that as the lease of *March*, 1816, was only voidable, the infant ought to have avoided it, within a reasonable time after he came of age. The infant dissolved the partnership the day after he came of age, and might, therefore, have avoided the lease at an earlier period. On these grounds, the learned Judge nonsuited the plaintiff.

Best, Serjt., in the last term, had obtained a rule *nisi* to set aside the nonsuit, and have a new trial.

Copley, Serjt., now showed cause. If an infant continue in possession, after his full age, of lands demised to him during his minority, he affirms the lease, and makes himself liable for arrears of rent incurred before, 1 Ro. Abr. 731, l. 45. If one leases to an infant, which purports a benefit to him, there is no need of any positive act of confirmation: if, indeed, he does any positive act of confirmation, he is bound in an instant. In order to the avoidance or confirmation of such a contract, the infant must make his election within a reasonable time. In *Doe, dem. Bromfield, v. Smith*, 2 T. R. 436, the delay of a year was held unreasonable; but the court said, that if notice had been given within a week

or a fortnight, such notice would have *been reasonable. The principle of that case is applicable here, for the plaintiff continued in possession, as far as the knowledge of the lessor extended, for four months. [*Dallas, J.* The case of *Doe, dem. Bromfield v. Smith*, materially differs from the case before the court; for the contract in the former case was not the contract of an infant.] If an infant convey his land, he may have a writ of *dum fuit infru etatem*; but he must bring that in a reasonable time. The true distinction between contracts for an interest in land, and contracts for the sale of goods, is, that, in the former, the contract is in force *suo rigore*, and binds the infant, if no communication be made; in the latter, there must be a positive act of confirmation. In the case of *Kirton v. Elliott*, 2 Bulst. 69, the doctrine relative to infant lessees is clearly laid down; and, there, the infant lessee was held liable to the rent. *Haughton, J.*, in that case says, "If a lease be made of an acre of land to an infant, rendering 100*l.* rent by the year, and he doth occupy and enjoy this, he shall be charged with the rent, he being here to be taken as a purchaser." [*Park, J.* In *Evelyn v. Chichester*, Mr. Justice Yates, 3 Burr. 1719, cites the case of *Kirton v. Elliott*, and confirms the doctrine there laid down.] 'There being no communication of the dissolution of the partnership to the lessor, and one of the partners continuing in possession, that is the possession of both. 'The defendant knew not, till the time of the new arrangement with *Taylor*, that the plaintiff was an infant; he never knew, that the money for which this action is brought, was the plaintiff's money only. The money was all paid together, half by bills accepted in the partnership name, the other half by cash; which, therefore, was the cash of the *partnership. If the plaintiff can recover this sum of money from the defendant, what remedy has the defendant for the other moiety, as against *Taylor*? It would be the greatest injustice to allow *Taylor* to retain the property, and for the defendant to loose half the purchase money. The defendant could not sue the plaintiff on the bills, because, in *September*, it was known to the defendant, that the plaintiff was an infant; and there had been no express promise to pay.

Best, in support of his rule. Whoever may have obtained the money of an infant, under circumstances similar to the present, the infant has a right to follow it and recover it back; in such a case the law follows the justice. In the next place, the defendant, by his conduct, has made himself responsible for the acts of the infant's partner. The cases cited on behalf of the defendant do not apply; for this case stands on no established rule, but on its own peculiar circumstances, which render it of some importance; and, if the doctrine contended for by the defendant be admitted, the protection which the law has thrown round infancy, may, by a little dexterity, be rendered of no avail. Here an infant and an adult become partners; the adult has no money, the infant has, and pays it down; but the adult gives bills for his share of the payment: the defendant, then, sues the adult singly on the bills, recognizing, by that act, the infancy of the other partner; and, finding he can get nothing by the bills, keeps the money which he has received from the infant, and gets back the lease. When this bargain was made behind the back of the infant, the defendant recognized his infancy, and his disaffirmance of the contract, previously entered into, on his coming of age. The case in *Rolle's Abridgment* is against the defendant; for here, the infant does *not continue in possession, after he arrives at the age of twenty-one years. The premises were taken from the defendant for the purposes of trade and not for the plaintiff's individual occupation; when, therefore, the plaintiff gave up the partnership he gave up the lease. The case of *Doe, dem. Bromfield v. Smith*, only proves, that when a stranger is to make an election, reserved to him by the deed of another about a certain time, he must elect on or about that time. If an infant occupy an estate, he must pay the rent; *aliter*, if he do not take or keep possession, so as to exclude the possibility of his enjoyment of it, or deriving benefit from it. Here, when the infant put an end to the trade, he put an end to the possibility of his deriving

any benefit from the lease. A lease to an infant is not void, but only voidable at his election; and, if the lease be beneficial to him, he is liable to an action of debt for the rent reserved, *Ketsey's case*, *Cro. Jac.* 320. In *Manby v. Scott*, 1 Mod. 137, *Hyde, C. J.*, said, "If an infant give or sell goods, and the vendee or donee take them by force of the gift or sale, the infant may have an action of trespass against him." If an infant part with property, either real *Fin. Abr.* tit. *Infant*, B, or personal, *Id.* E, he may recover it back again; and, if an infant pay money with his own hands, the payment is voidable, and the money may be recovered back in an action of account. *Per Hobart C. J.*, *Austen v. Gervas*, Hob. 77.

DALLAS, J. In this case some points are clear. I agree that, in every instance of a contract voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time; and, if the case before the court were that simple case, I should be disposed to hold, *40] that, as the *infant had not given express notice of disaffirmance within four months, he had not given notice of disaffirmance in reasonable time. But this is not such a simple case, and we must see what are the circumstances of it. The facts are these. The plaintiff, being under age, entered into partnership, for the purpose of carrying on trade with *Taylor*; and the two persons executed a lease, by which they became tenants to the defendant. The trade was carried on by both parties, until the plaintiff became of age; on the day after that event, the infant gave notice to *Taylor*, of the dissolution of the partnership, and his name was soon afterwards removed from the door. This I admit, could have no effect, as far as the lessor was concerned; but, it appears most improbable, that the infant should have intended to continue tenant of the premises, when he had given up the trade. Here, again, it was necessary that notice should be given; but the question is, whether the defendant has not so treated the plaintiff as to dispense with notice of disaffirmance in any formal shape? What is the defendant's conduct? Why should he sue *Taylor* only, on the bills to which the plaintiff was also a party, if he had not considered, that the lease, for which those bills were given in part payment, was, as far as the plaintiff was concerned, at an end? The defendant then comes to an entirely new arrangement with *Taylor* respecting the lease, and putting aside all question concerning the effect of the surrender by one of two joint tenants, he receives from *Taylor* a surrender of the lease, in consideration of the defendant's staying proceedings against him upon the dishonored bill, and releasing him from his liability to the other bills; and all this is done without the knowledge or privity of the plaintiff. What right had the defendant to act thus, if he still contemplated the plaintiff as a joint lessee with *Taylor*? The question, *41] then, is whether the jury *would not have been of opinion, if the facts had been left to them, that the defendant had dispensed with formal notice of disaffirmance. To give the jury an opportunity of forming an opinion upon these facts, I think that, in this case, there should be a new trial; but, whatever I may think, as to the reasonableness or unreasonableness of time of giving notice of disaffirmance, I give no opinion thereon, being unwilling further to burthen a case already sufficiently difficult.

BURROUGH, J. The form of the action is or is not correct, according to the plaintiff's right to recover. It is a strong fact, that the plaintiff dissolved the partnership the day after he became of age, leaving the house, which was part of the partnership effects, in the possession of *Taylor*. Then, how does the defendant treat *Taylor*? he treats him as the person having the sole possession of the lease; and the fact is, that *Taylor* alone was left in possession of the premises. That the defendant does so treat *Taylor*, is clear; for, having sued him on one bill, the defendant abandons his action, releases him from the payment of the other bills, and says, you shall give me up, in return, the lease: solely and entirely treating *Taylor* as the person entitled to this lease, as the person, to whom alone he looks for rent, and whom he acquits of the rent.

Neither party seem to dream, that the plaintiff has any thing to do with the lease. These are very strong facts, such as ought to be dealt with by a jury; and I, therefore, think, that, in this case, there ought to be a new trial.

PARK, J. This case has taken a singular turn, for the points, on which my brothers decide, are wholly alien to the points saved, and on which the case was moved. In all the cases, it has been allowed to infants at full age, to affirm or disaffirm contracts made by them *during infancy; but do those cases go the length of saying, that an infant may take three or four months to make his election? It strikes me, that it is absolutely necessary for an infant to do some act of disaffirmance in such a case as this: I do not say, that it is necessary for him to give a positive notice. It has been said, that the defendant, when he took the surrender of the lease from *Taylor* alone, admitted the infancy of the plaintiff; but it does not appear on the report, that it ever was stated to the defendant, that the 157*l.* belonged to the plaintiff only. Then, when the defendant comes in *September*, and says take your lease back, how does it appear that the fact was known to the defendant, that the money was the plaintiff's only? [*42]

Rule absolute.†

† [See 5 Barn. & Ald. 147. *Good et al. v. Harrison*, 14 Mass. Rep. 457, *Whitney et al. v. Dutck*. Post. 508, where the case in the text was finally disposed of.]

HARDING v. GREENING.

[1 Moore 477. S. C.]

The defendant, a tradesman, was accustomed to employ his daughter to write his bills and letters. A customer, to whom a bill written by the daughter, had been sent by the daughter, being advised by the plaintiff that the charge was too high, sent it back: it was returned to her, inclosed in a letter also written by the defendant's daughter, which constituted the libel: Held, that in an action for the libel this evidence was not sufficient to fix the defendant. Secondly, it was also held, that the daughter, in such case, could not be called as a witness to prove by whose direction the letter was written.

ACTION for a libel. At the trial before *Gibbs*, C. J., at the *London* sittings after *Trinity* term, 1816, the following facts were proved. The plaintiff had formerly been journeyman to the defendant, whom a lady named *Mrs. Lambert* was in the habit of employing as a carpenter. A bill of the defendant's appearing to *Mrs. Lambert* exorbitant, she employed the plaintiff to inspect the bill, who reduced it; and *Mrs. Lambert* sent the bill so reduced to the defendant, and offered to *pay him the reduced amount. This bill was returned to *Mrs. Lambert* in a cover, which contained the libel complained of. The [*43] bill and libel were written in the same character, and the bill was proved to be the handwriting of the defendant's daughter, whom the defendant was in the habit of employing to draw out his bills, and write his letters of business. *Gibbs*, C. J., was of opinion, that, though this bill was in the handwriting of the daughter, and though the defendant employed her to write his letters of business, there was not sufficient evidence to fix the defendant as the author of the libel. The defendant might have given to his daughter this bill so returned to him, with instructions to write concerning it: what the daughter wrote might not, as to the libellous part, have been in consonance with the defendant's instructions, and it did not appear that the defendant saw the letter after it was written. His lordship, for these reasons, directed a nonsuit.

Vaughan, Serjt., who, in the last term, had obtained a rule *nisi* to set aside this nonsuit and have a new trial, was now called on by the court to support his rule. He agreed that this was not evidence to fix the defendant, but contended that it was evidence which ought to have been left to the jury. The libel in question related to the bill delivered to Mrs. *Lambert*, and by her re-delivered to the defendant; and it was in proof that the bill was a second time sent to Mrs. *Lambert* by the daughter, in consequence of a communication made to her by the defendant; and this, being uncontradicted, was matter to be left to the jury for them to determine whether the publication of the libel, which accompanied the bill, was not made by the defendant. One who procures another to publish a libel is guilty of the publication, in whatever county it may, in consequence of *his procurement, be published, *Rex v. Johnson*, 7 East, 68 *44] *verba Ellenborough*, C. J.; and *Lawrence*, J., Id. 70, in that case, said, "Is there not evidence to go to the jury, for them to decide whether the papers were sent by the defendant or by some other person?" So, here, it should have been left to the jury to say whether the libel was or was not published by the authority of the defendant; and this fact the daughter might have proved.

DALLAS, J. With respect to the last reason for this application, an undertaking to place in the box, at a future trial, a witness whom the plaintiff might have placed there at a former trial, would be a most extraordinary ground on which to grant such a motion as the present. As to the other point, I agree that, if there had been any evidence at all to show that the defendant was the author of the libel, such evidence ought alike to have been left to the jury, whether it had been tendered on the trial of an indictment for a libel, or on the trial of a civil action for a libel. The plaintiff must, therefore, go the length of showing, that, at the trial of this cause, evidence was adduced which would have been sufficient, in case the defendant had been indicted, to prove that he was the author of the libel. Now, can the writing of this libel be considered as coming within the scope of the authority delegated by the defendant to his daughter? It is, indeed, shown that he had given her authority to write for him in common cases, because he could not write himself; but there is not a grain of evidence to show that he had given his daughter authority to write *45] libels in general, or that the defendant had even seen the *letter containing this particular libel. But, it has been said, the daughter might have been called as a witness, to prove by whose procurement the libel was written. If she had been placed in the box, she might have refused to answer any question which would tend to implicate herself in an indictable offence; and it no where appears that she had been authorised to do an illegal act. I am clearly of opinion, that there is no evidence whatever in this case, either of command, authority, adoption, or recognition, to go to a jury, and that the nonsuit is perfectly right.

PARK, J. I am of the same opinion. The case put by the counsel, of the sale of a book by a bookseller's servant in his shop, is quite beside the question: there, the act is done in the regular course of trade.

BURROUGH, J. I am clearly of opinion that the daughter could never be called. She was indictable for the offence.

Rule discharged.

Best, Serjt., was to have shown cause against the rule.

LEE et. al. v. MUNN.

[1 Moore 481. S. C.]

A purchaser of an estate by public auction, deposited a sum with the auctioneer as part of the purchase money, until the vendor made out a good title, according to the conditions of sale. No good title was made out; but the treaty was kept open with the auctioneer for four years from the time of the sale, and no demand had been made on him for the re-payment of the deposit: Held, that, in such case, the auctioneer is not liable to the purchaser for interest on the deposit money.

THIS was an action brought against the defendant, an auctioneer, for the recovery of the sum of 200*l.*, being a deposit paid to him by the plaintiffs on the *purchase of a freehold estate by public auction, the title to which afterwards [*46 proved defective; the plaintiffs also claimed interest on the deposit, as well as 37*l.* 11*s.* 2*d.* for the costs relative to the investigation of the vendor's title. The first count of the declaration stated, that the defendant caused to be put up and exposed to sale by public auction, premises therein described, subject to certain conditions of sale, one of which was, that the highest bidder should be the purchaser, and pay immediately a deposit of 20*l.* per cent. in part of the purchase-money, to the defendant, and sign an agreement to pay the remainder on or before the 30th of *January*, 1813, on a conveyance being made according to the terms mentioned in the conditions of sale. The plaintiffs then averred, that they became the purchasers of the premises, for the sum of 1000*l.*, that they then paid to the defendant 200*l.*, as a deposit of 20*l.* per cent., in part of the purchase-money, and that, although they were ready and willing to perform and fulfil all things in the conditions contained on their parts, as such purchasers, to be performed and fulfilled, and to pay the remainder to the purchase-money, on a conveyance being made agreeably to the conditions of sale, and to complete the purchase; yet, that the defendant did not, nor would make or procure to be made to the plaintiffs a good title to the premises, or make a conveyance thereof, agreeably to the conditions of sale; by reason whereof the plaintiffs had been deprived of all the benefits and advantages which would have arisen to them from the completion of the purchase, and had been put to the expense of 100*l.* in endeavoring to procure the title and to get the purchase completed, and in and about the investigating the title of the vendors of the premises to sell and convey the same, *and had lost all gains and profits [*47 which they might, and, otherwise, would have made and acquired from using and employing the sum of money so paid by them as a deposit, and other moneys provided and kept by them for the completion of the purchase. The declaration also contained counts for interest and the common money counts. The defendant pleaded *non assumpsit*, and paid the deposit-money into court, upon the count for money had and received. At the trial, before *Gibbs, C. J.*, at the *London* sittings after *Trinity* term, 1817, it appeared, that the estate belonged to Messrs. *Dowleys*, that the auction took place in *December*, 1812, and, that the estate was knocked down to one of the plaintiffs, who paid the deposit of 200*l.* by a draft on his bankers. Certain letters were then read in evidence. The first letter was dated on the 6th of *April*, 1816, and written by the defendant to one of the plaintiffs, in which the defendant stated, that he had seen his attorney, who had advised the plaintiff *Lee* to complete the purchase;—the second was dated on the 22d of *May*, 1816, and written by the defendant's attorney to the attorneys for the plaintiffs, as follows:

“*Munn, ats. Lee.*

“Gentlemen,

“I understand, from Mr. *Munn*, that he saw Mr. *Lee* yesterday, who expressed himself still willing to complete the purchase, provided a good title

could be made; and, that it was agreed between them, that Mr. Lee should be entitled to interest on his deposit, from the time of sale, together with costs;—from some recent investigations, I have no doubt we shall be enabled to make out a very satisfactory title shortly, and, particularly, with respect to the possession of one of the thirds of the estate;—under such circumstances, *I presume you will suspend the action for the present; and I have no hesitation in adding, that we have no intention to defend this action.”

The third letter was dated the 29th of *July*, 1816, from the defendant's attorney addressed to the attorneys for the plaintiffs, stating, that the vendors were willing to accede to certain proposals made by them for settling the purchase, as to one third of the estate, viz. that the vendors were to have the rent to *Midsummer* then last, to pay the interest on the deposit to the same period, to pay the costs of this action, together with the expenses of investigating the title and costs of the conveyance, and that the purchasers should take the title as it was. The fourth letter was dated on the 20th of *November*, 1816, from the same to the same, intimating a wish that the purchase might shortly be completed. The last letter was dated the 18th of *February*, 1817, and headed *Dowleys* ats. *Lee*, (all the other letters having been headed *Munn* ats. *Lee*,) from the same to the same, in which the defendant's attorney stated, that the vendors objected to the completion of the purchase on the terms proposed. *Gibbs*, C. J., was of opinion, that the plaintiff was not entitled to recover the costs of investigating the title against the auctioneer, who was an innocent agent; but, considering the plaintiff's claim for interest to raise a question of great moment, on which he wished to have the opinion of the court, he directed a verdict to be entered for the plaintiffs for 43*l.*, being the amount of the interest claimed, subject to alteration to a verdict for the defendant, or to a reduction of damages, as the opinion of the court might be. Accordingly,

Lens, Serjt., having, in the last term, obtained a rule *nisi* to that effect, when the Lord Chief Justice mentioned *the cases of *De Barnales v. Wood*, 3 *49] *Camp*. 258, and *Calton v. Bragg*, 15 *East*, 223.

Pell, Serjt., now showed cause against the rule. The question is, whether the plaintiffs are entitled to any and what interest on their deposit, the purchase not having been completed. They are entitled to interest from the time of the deposit to the commencement of their action, or, at all events, from the time of the deposit to the 22d of *May*, 1816. Against the principal, interest is clearly recoverable. Where the purchaser, at an auction of a reversionary interest in bank stock, upon the failure of the vendor to deduce a title, had recovered back the deposit in an action against the auctioneer, it was held, that he might, nevertheless, recover, under an averment of special damage, interest on the deposit in an action against the principal for not completing his contract, *Farquhar v. Farley*, Ante vii. 592, *S. C.* 1 *B. Moore*; 322. *Flureau v. Thornhill*, 2 *W. Bl.* 1078, was an action against the principal, and there *Blackstone*, J., says, if the vendor has not a good title, the return of the deposit with principal and interest is all that can be expected. In *Cornish v. Rowley*,† which was an action for money had and received, to recover a deposit paid for the purchase of an estate, Lord *Kenyon* said, “As a good title was not made out on the day fixed, I shall direct the jury to find a verdict for the deposit, with interest up to that day.” The same principle is strongly laid down in *Richards v. Barton*, 1 *Esp.* 268; and the case of *Turner v. Beurain*‡ is still stronger: that was an action for breach of agreement; a house had been sold by auction, *50] and an *objection was taken at the trial touching a fee-farm rent, which was not noticed in the particulars of sale. The defendant did not argue the point, and a verdict was given against him for the deposit, together with the

† *Selwyn's N. P.* 4th ed. 170.

‡ *Sugden's Vendor and Purchaser*, 193, 227, 4th ed.

expenses incurred in investigating the title, they being laid as special damage. In *De Barnales v. Wood* the court allowed interest, as special damage, from the day when the purchase ought to have been completed. All the above cited cases were actions against the principal: *Maberly v. Robinst* was an action against an auctioneer; but the declaration contained no count for interest, and, on that ground only, the plaintiff's counsel consented to strike off the interest from the verdict, and reduce it to the amount of the deposit. In that case it never was even hinted, that the plaintiff could not recover because the defendant was an auctioneer; the absence of the count for interest alone operated there. [*Dallas, J.* In *Farquhar v. Farley, Gibbs, C. J.*, says, "If, indeed, it had appeared, that the auctioneer had actually made interest of the money, it might have been a question, whether that interest might not be recovered against the auctioneer." This goes some way to show, that the action, which will lie against the principal will not lie against the auctioneer.] The dictum of *Gibbs, C. J.*, in *Farquhar v. Farley* was extrajudicial, for the action there was against the principal. But supposing that dictum to be law, one point would be, whether or not the auctioneer had made interest during the time; and how is that fact to be ascertained by the plaintiffs? Although it may be daily a subject of inquiry in equity, whether trustees have made interest or not; a court of common law will not, in every action of this kind, drive its suitors into a court of equity. Be the law as it may, the facts of this case take it out of the [*51] general rule, and entitle the plaintiffs to interest: but it cannot be conceded that an auctioneer is not liable to interest. In *Spurrier v. Elderton*, 5 Esp. 1, the action was *assumpsit* on the common money counts. The defendant had employed the plaintiff, an auctioneer, to sell his estate, which was knocked down; the deposit-money was paid, and the title was objected to: the purchaser brought an action against the plaintiff to recover the deposit-money. The plaintiff gave his principal notice of the action, who declined defending; whereupon the plaintiff re-paid the deposit, the costs of the action, excise duty, and interest from the time of making the deposit, and then brought his action against his principal to recover the same. *Ellenborough, C. J.*, held, that though, for want of a special count, the costs of the former action could not be recovered; the plaintiff might recover the money actually paid, under the declaration as then framed. According, therefore, to *Spurrier v. Elderton*, if the present plaintiff recover against the present defendant his deposit-money, and the interest thereon, the defendant will have his action against his employer, to recover from him whatever he may be compelled to pay by this action. But, it is urged, that it would be an answer for the auctioneer to show, that he had not made interest. However that may be, the defendant in this case has, down to a late stage of the cause, at least, made himself a principal; and an auctioneer is liable to all actions, to which his principal would be liable, if, at the time of the sale, he has not disclosed the name of his principal; even though he be not called on to disclose it. *Hanson v. Roberdeau*, Peake N. P. C. 120. [*Dallas, J.* I see on my lord's note, that the counsel for the plaintiff stated to "the jury, that the defendant acted as principal, and that his lordship ruled, that the plaintiff could not recover interest and the expenses of investigating the title against the auctioneer.—*Park, J.* In the particulars of sale, it is expressly stated, that the defendant was auctioneer.] It appeared no where in evidence, that the defendant ever refers the plaintiffs, or their solicitors, to the principal or the attorney for the principal; and this he would have done, if he had not himself been the principal. The contract of sale was in *December, 1812*; and, in *April, 1816*, the defendant, having through all that interval been in treaty with the plaintiff for an alteration in the terms, writes to the plaintiff *Lee* a letter, such as a principal would have written, followed by another of the same import in *May, 1816*. The plaintiffs are deluded by prospects held out to them, that a

good title would be made; and when at last the defendant fails totally in making such a title, they are told, after all their trouble and expense, and after a lapse of four years, that the bare deposit-money is all that they can recover. It is true, the letter of *February*, 1817, is headed *Dowleys* vs. *Lee*; but, till that time, the names of *Dowleys* as principal had never been mentioned; up to *May*, 1816, therefore, the plaintiffs are entitled to interest on the deposit-money paid by them. The defendant employs his separate attorney, defends the action for himself, and by his attorney's letter, admits his liability to the interest to the period last mentioned.

Lens, Serjt., in support of his rule. If the defendant, as auctioneer, is not liable to interest, he, having paid the deposit money into court, is entitled to have the verdict entered for him. He is not liable to interest; and though great

*53] difficulties have arisen on the question of interest, the last determination only goes the length of showing, that under certain circumstances, the plaintiff may recover interest, if there be a special count, giving intimation of that interest. If it be necessary that the defendant should have made interest, that fact must be shown; for it does not necessarily follow, that, at all events, interest ought to be paid. A deposit of money on a sale, is only so much money paid upon account; it is not money lent. [*Dallas*, J. I can find no case in which it has been distinctly held that interest may be recovered against an auctioneer. The only case where it has distinctly been attempted, is that of *Maberley v. Robins*, in which the question was raised, and afterwards abandoned; and this question, therefore, now neatly and plainly arises for the first time.] As against the auctioneer the plaintiff cannot recover. First, there is no contract with the auctioneer; next, he stands as a stake-holder,† to hold the money until it appears to which of the two parties it shall go. He is intrusted with it for a special purpose, and cannot make interest of it. As there is no special contract, that the auctioneer should pay interest, interest can only be recovered in the shape of damages sustained by the plaintiff, in being prevented from making interest of the money; but, by the plaintiff's own contract, he is precluded from holding the money, or making interest of it. The letters in this case clearly show, that, up to the time of bringing the action, the parties never lost sight of the original contract, or of the prospect of coming to an amicable arrangement; and where is the period, after which the defendant wrongfully and pertinaciously retains the money? The letters, too, all clearly show, that the defendant was auctioneer, and not principal: from none of them

*54] can it be collected, that the estate belonged to the defendant. In *Maberley v. Robins*, the question of interest was abandoned; and *Spurrer v. Elderton*, stands quite on a different ground from the case before the court. The court never meant, in that case, to distinguish the interest from the residue of the money. The case is entirely new, and principle must decide it.

DALLAS, J. As this case was tried before the Lord Chief Justice; and, as it is certainly a case of considerable consequence, it is better, perhaps, that we should communicate with his lordship before we come to a decision upon it. Were I called on now to decide, I should, under the circumstances of the case, feel no difficulty whatever: but, on the general question, I should feel much doubt; for, the question of an auctioneer's liability to interest has, in many cases, been raised, but, in none decided. My brother *Lens* has argued on the true ground, by tracing the supposed liability of the auctioneer to its origin. The principal and auctioneer stand on very different ground; the principal contracts with the purchaser, that, he has a good title to the estate to be sold; and, on the faith of that, induces the purchaser to divest himself of the possession of his money; but the auctioneer's contract is only to hold the money, and, at the moment when one of the parties becomes entitled to it, to deliver it to such party. After failure to complete the contract, demand made on the auctioneer

† See *Burrough v. Skinner*, 5 Burr. 2639.

‡ See *Calton v. Bragg*, 15 East, 223.

for the deposit money, and refusal by him to return it, I should think, that the purchaser might possibly be entitled to interest from the time of such refusal; and, that the auctioneer would, under such circumstances, retain the money at his own peril. But, in this case, the negotiation was kept open, and no demand was ever made: I should, therefore, if now called on to decide, say, that there was no ground on *which the plaintiff can be held entitled to recover. I [*55 was, at first, greatly struck with the delay which had intervened in this case; but that impression is much weakened, upon observing, that the treaty, during all the time of such delay, was kept on foot.

PARK, J. I, at first, thought, that *De Bernales v. Wood* was an action against the auctioneer; but, on sending for the brief, I find that it was against the principal. At the same time, were it now necessary to decide the general question, I should hesitate much before I delivered my opinion: for in *Edwards v. Hodding*, (Ante, v. 815. S. C. 1 *Marsh.* 377,) it was held, that the auctioneer was not warranted in paying over money to the principal, before the title was cleared up. The case, however, now before us, is decided by us on the special circumstances which compose it.

BURROUGH, J. An auctioneer can never be liable to interest, unless two circumstances concur. First, the contract must, on failure of the condition, be rescinded; secondly, a demand of the deposit must be made, and a refusal to return it must be given. The case of *Edwards v. Hodding* was decided on very special circumstances. There the defendant was attorney to the vendors as well as auctioneer, and was cognizant of the defect in the title before he paid over the money; he paid it over, nevertheless, and *Dampier, J.* held, that the plaintiff was entitled to recover on that express ground.

DALLAS, J. Unless the court say any thing further on this case, it may be taken, that it is decided by the court upon the very special circumstances thereof; the treaty with the auctioneer having been kept open, and *the contract not having been rescinded. The court studiously abstain from [*56 deciding the general question.†

Rule absolute, to enter a verdict for the defendant.

† The case was not mentioned again; and *Gibbs, C. J.*, was understood to have concurred in the judgment.

HOPPER et al. v. JACOBS.

Bail permitted to justify at the rising of the court before the last day of the term.

VAUGHAN, Serjt., was permitted to justify bail at the rising of the court, notwithstanding the general rule, (*Mich.* 51 *Geo.* 3. Ante, iii. 569,) which directs, that, thenceforth, bail should justify at the sitting of the court only, and at no other time, except on the last day of term. He urged this request, upon the ground that the bail were not present in court when before called; and he intimated, that probably they might have gone at that time to justify themselves as bail in the Court of King's Bench: but he produced no affidavit thereof.

*WATMORE v. BRUCE.

The court granted a *distringas* on affidavits, stating, that it was believed that the defendant absconded to avoid process, that repeated applications had been made at his house, and no satisfactory answer had ever been given to the enquiry as to the time of his coming home; and that on learning that the business of the applicant was to serve the defendant with process, the persons at the house treated him with derision.

VAUGHAN, Serjt., moved for a *distringas* against the defendant, on affidavits, which stated, that it was believed, that the defendant absconded to avoid process; that repeated applications had been made at his house, and no satisfactory answer had ever been given; that, to an enquiry made concerning the time of the defendant's coming home, the answer was, that the time of his coming home was uncertain; that the persons giving such answer, desired the officer to leave his name and business, and, after learning it, upon his subsequent calls seemed to laugh at him.

The court granted the application.

The KING v. CURWIN, a Prisoner.

[1 Moore 494. S. C.]

A prisoner, under an attachment for contempt for non-payment of costs pursuant to an award, may be brought up at the suit of the prosecutor, in order to make him deliver in a schedule of his effects, under the compulsory clause in stat. 32 G. 2. c. 28. The court considered the 33 G. 3. c. 5., as incorporated with the 32 G. 2.

THE defendant, a prisoner in the custody of the warden of the fleet, under an attachment for contempt for non-payment of costs, pursuant to an award which *58] had been made a rule of court, was, on a former *day, brought up at the suit of the prosecutor, under the compulsory clause of the stat. 32 Geo. 2. c. 28. s. 16.†

Heywood and Copley, Serjts., for the prisoner. The defendant does not come within the purview of the stat. 32 Geo. 2.: for, the compulsory clause in that act does not extend to debtors who seek relief under an attachment, but to such prisoners only as are charged in execution. The penal clause of that act (seventeenth section) must be construed strictly; and there it is enacted, that, if a debtor do not deliver in a schedule of his effects, and make an assignment thereof for the benefit of his creditors, he is liable to transportation. This cannot apply to a prisoner under an attachment for non-payment of costs. The statutes 32 Geo. 2., and 33 Geo. 3. c. 5.,‡ were passed with different views;

† Which enacts, That if any prisoner, who shall be committed or charged in execution in any prison, for any debt or damages not exceeding 100*l.* besides costs, (since extended to 300*l.* by the statute 33 Geo. 3. c. 5. s. 3.) shall not, within three months next after every such prisoner shall be committed or charged in execution, deliver up his estate and effects to satisfy his creditors, they may compel such prisoner to be brought up, and deliver into court a schedule of his estate and effects, and the incumbrances affecting the same, upon oath, giving the prisoner twenty days' notice of such intention, in order that his estate and effects may be divested out of him, and assigned and conveyed as therein-after directed.

‡ s. 4. Whereby, after reciting that persons are often committed on attachments for not paying money awarded under submissions to arbitration by or made rules of court, and likewise not paying costs, duly, and regularly taxed and allowed, after proper demands made for that purpose, and also upon writs *excommunicato capiendo*, or other process for, or grounded on the non-payment of, costs or expenses in causes or proceedings in ecclesiastical courts, it is declared and enacted, that "all such persons are and shall be entitled to the benefit of this act, and subject to the same terms and conditions as are herein expressed and declared, with respect to prisoners for debt only."

the first, with the view of relieving the debtor; and the second, with the view of compelling the debtor to deliver up his *effects to the creditor: but the last statute cannot be extended to compel a prisoner under an attachment for non-payment of costs, to deliver a schedule of his effects, under the compulsory clause of the former act. [*59]

Blosset, Serjt., *contra* contended, that these statutes must be considered as incorporated, and, that, on the construction of the whole of the stat. 33 Geo. 3., a prisoner could not be entitled to relief, without being subject to the compulsory clause of the 32 Geo. 2.

Cur. adv. vult.

DALLAS, J., now delivered the judgment of the court. This question has arisen on the construction of two acts of parliament, the 32 Geo. 2. c. 28., and the 33 Geo. 3. c. 5., relative to the discharge of insolvent debtors; neither of which, it is said, can affect the prisoner, inasmuch as he is in execution under an attachment for the non-payment of costs. In order to determine this, I will first consider the former statute, and then see what alteration has been wrought in the construction of it, by that of the 33d of the present king, c. 5.

By the 32 Geo. 2. c. 28. s. 17., a prisoner, who neglects or refuses to deliver in a schedule of his estate and effects, or to make an assignment or conveyance thereof, is to be transported for seven years. Certainly a statute so highly penal, must be construed strictly; and, therefore, it is urged, that an attachment for the non-payment of costs, does not constitute such a debt as will enable a prisoner to avail himself of the statute: the whole question, in short, turning on a supposed distinction between common debts and attachments: and I say a supposed distinction, for we are all of opinion, that the attachment in question being one of a civil nature, there is essentially no difference between this and any other debt, so far as respects the question *before us. In *Rex v. Stokes*, Cowp. 136, the distinction now attempted to be set up was raised [*60] at the bar, but vanished in the course of the argument. Mr. Justice *Aston* there said, "an attachment is an execution in a civil suit:" and Mr. Justice *Willes* declared it to be "in all respects as a *civil debt*," and that "it does not differ from *other civil demands*." Mr. Justice *Ashhurst* was of opinion that the case might "fairly be included under the words debtor and creditor, in the Lords' Act." The next case is *Rex v. Myers*, 1 T. R. 265, where Mr. J. *Buller* says, "it has been settled of late years, that an attachment for non-performance of an award, is only in the nature of a civil execution." Then comes the case of *Rex v. Pickerill*, 4 T. R. 809, where the prisoner was in execution for the contempt and for the costs on a *quo warranto* information; and the court agreed, that the fine to the king, was merely nominal, and that "that would be no objection to the defendant's being discharged out of custody, under the Lords' Act, as to the execution for the costs, which was now considered as an execution in a civil suit." In addition to those cases, one has been decided in *Trinity* term, in the 47th of the king, which shows, that the later acts have made no alteration in this construction of the statute of Geo. 2. Now the other statute referred to in the argument, *viz.*, that of the 33d of the king, is not only enacting, but declaratory. If, therefore, the law had been previously settled by these cases, that attachments of this kind are of the same nature as other civil debts, this latter statute must be considered as having adopted this classification, unless it be argued, that this statute is *pro tanto* a repeal of the former.

Now, what is the title of the 33 Geo. 3. c. 5? It is stated to be passed for the further relief of debtors, *and, "to oblige debtors to make discovery of, and deliver upon oath, their estates, for their creditors' benefit." Its [*61] object, then, is to compel a disclosure and an assignment, for the benefit of creditors. Accordingly, the third section enacts, that the creditors, whose cases come within the act, shall have such compulsory remedies against their debtors,

"as is provided by the before recited act;" 32 Geo. 2. c. 28, thereby incorporating the former act, and referring us to it for the conditions upon which the parties shall avail themselves of the reciting act. Then the fourth section enacts, that prisoners on attachments for not paying money awarded by arbitration, and likewise for not paying of costs, &c., "shall be entitled to the benefit of this act, and subject to the same terms and conditions as are herein expressed and declared, with respect to prisoners for debt only." But what are these conditions but such as are referred to in the third section; or, in other words, those adopted by that section, and incorporated into this act, from the Lords' Act?

Independently of the reasons which I have given for our judgment, I consider this question as in reality already disposed of by the case of *Rex v. Pearce*, which I have already alluded to, as having been decided in *Trinity* term, in the 47th year of the king; and, therefore, subsequently to the stat. 33 Geo. 3. c. 5., now under consideration. The prisoner was brought up under the compulsory clause of stat. 32 Geo. 2.; and, though an objection was made to the discharge on the ground of insanity, no notice was taken of the objection now urged on account of the nature of the debt, which was an attachment, as in the case before us. Looking, therefore, to what has been decided, (though this question does not appear to have arisen in terms,) to the sound construction of the statute, and to the sense and reason of the thing, we are of opinion, that the prisoner ought to be

Remanded.

*62]

*FERRY et al. v. WILLIAMS.

[1 Moore 498, S. C.]

The defendant purchased a leasehold estate of the plaintiffs at a public auction, subject to certain conditions of sale, which were, "that the purchaser should immediately pay down a deposit in part of the purchase-money, and sign an agreement for payment of the remainder within twenty-eight days from the day of sale, when possession should be given of the part in hand; and that the purchaser should have proper conveyances and assignments of the leases, without requiring the lessor's title, on payment of the remainder of the purchase-money." *Assumpsit* was brought by the vendor against the purchaser for the non-performance of the conditions on his part. After a verdict for the plaintiffs, on a motion in arrest of judgment, on the ground that the plaintiffs had not set out their title or tendered the conveyances to the defendant, it was held, that the plaintiffs were not bound to set out their title; and that allegations, that they were ready and willing to convey, and that they were ready and willing, and actually offered to convey, were equivalent to a performance of the conditions on their parts.

In *assumpsit*, the plaintiffs declared, that they caused to be put up to sale by public auction (amongst other things) a certain leasehold estate, subject to the following (amongst other) conditions of sale; that is to say, "that the purchasers should pay down immediately a deposit of 25*l. per cent.*, in part of the purchase-money; and sign an agreement for payment of the remainder within twenty-eight days from the day of sale, when possession should be given of the part in hand; that the purchasers should have proper conveyances and assignments of the leases at their own expense, without requiring the lessor's title, on payment of the remainder of the purchase-money; and that all out-goings should be cleared to *Midsummer* then last; that the duty of seven-pence in the pound should be equally borne between the vendor and purchaser; that, if the purchaser should neglect or fail to comply with the above conditions, the deposit-money should be forfeited, the proprietors should be at liberty to re-sell the estate by public or private sale, and the deficiency, if any, attending such sale,

with all incidental charges, should be made good by the defaulter. And the plaintiffs averred that the defendant afterwards became the purchaser of *the said estate, subject to the said conditions, for the sum of 2835*l.*; and the defendant then paid 200*l.* in part of the purchase-money, and signed an agreement for payment of the remainder within twenty-eight days from the day of sale. And, after averring mutual promises of performance, they alleged, that although the plaintiffs did give the defendant possession according to the said conditions, and were also ready and willing to give and make to him proper conveyances and assignments of the leases of the said estate at the defendant's expense, on payment of the remainder of the purchase-money, and to clear all out-goings to *Midsummer*, according to the conditions, and well and truly performed, fulfilled, and kept the conditions on their parts, according to the tenor and effect, true intent, and meaning thereof; yet the defendant did not nor would pay them the remainder of the purchase-money, or pay or bear his share of the duty of seven-pence in the pound, or accept such conveyances and assignments as aforesaid; but wholly refused to comply with the conditions, or complete or perform his contract of purchase or agreement. Whereupon the plaintiffs afterwards re-sold the estate by public sale, for the sum of 1438*l.* 10*s.*, and were put to great trouble and expense about such re-sale; and that on the second sale there was a deficiency, which, with the said duty (which was wholly borne and paid by the plaintiffs) and all incidental charges, amounted together to 1600*l.* In their second count, the plaintiffs stated, that they had contracted and agreed with the defendant, to sell to him, and that the defendant contracted and agreed with the plaintiffs, to purchase of them, a certain other leasehold estate, for the sum of 2835*l.*; and that, in consideration thereof, and that the plaintiffs had undertaken to convey to the defendant the said last-mentioned estate, he, the *defendant undertook to accept the conveyance thereof, and pay the plaintiffs the last-mentioned purchase-money in a reasonable time: and, although the plaintiffs were ready and willing, and offered to convey and assign to the defendant, the last-mentioned estate; and, although a reasonable time for accepting such conveyance, and paying the said last-mentioned purchase-money, had long since elapsed; yet the defendant would not, within such reasonable time, or afterwards, accept, or execute, such conveyances and assignments as last aforesaid, or pay the said last-mentioned purchase-money, or any part thereof, or in any manner perform the last-mentioned contract, for the purchase of the last-mentioned estate; whereby the plaintiffs not only lost, and were deprived of all the benefit which might and would have occurred to them by the defendant's performance, and completion of his last-mentioned contract, but were put to great charges and expenses in respect thereof, amounting to the sum of two hundred pounds; and were also put to further charges, amounting to the further sum of two hundred pounds, about the re-sale of the said last-mentioned estate to another purchaser. The declaration also contained counts for leasehold premises bargained and sold, and the money counts. At the trial before *Park, J.*, at the *London* sittings, after *Trinity* term, 1817, the jury found a verdict for the plaintiffs.

Best, Serjt., had obtained a rule *nisi*, in the last term, to arrest the judgment in this case, on two grounds; first, because the declaration set out no title in the plaintiff; and secondly, because there was no averment in the declaration, that any conveyance or assignment had been prepared and tendered, but merely that the plaintiffs were ready and willing, and offered to convey and assign. He cited *Luxton v. Robinson*, Doug. 620, the Duke *of *St. Alban's v. Shore*, 1 H. Bl. 270, *Phillips v. Fielding*, 2 H. Bl. 123, and *Martin v. Smith*, 6 East, 555. [64]

Vaughan, Serjt., on a former day in this term, showed cause against the rule. As to the second objection, the averment contained in the declaration is sufficient, and it is not necessary to aver an actual tender as a condition precedent. This may be collected from *Pordage v. Cole*, 1 Wms. Saund. 320. n. 4, and

the elaborate note of Serjt. *Williams*, on that case. That case is not much unlike the present ; for, here, the money is to be paid, at all events, within twenty-eight days of the sale ; but no precise time is fixed for the execution of the assignment, or conveyance. If either of the covenants form a condition precedent, the payment of the money is a condition precedent. But, whether that is to be considered as a precedent or concurrent act, is immaterial ; for, the parties come before the court after verdict, standing in a very different situation from that which they would have occupied, if this question had come before the court on demurrer. Where two concurrent acts are to be done, it is sufficient for the party, who sues for non-performance, to aver, that he was ready to perform his part of the contract, *Morton v. Lamb, Per Lord Kenyon, 7 T. R. 129.* So, in an action for the non-delivery of malt, an allegation, that the plaintiffs were ready and willing to receive the same, and pay for it according to the terms of the sale, was held sufficient, without averment of actual tender of the price agreed on, *Rawson v. Johnson, 1 East, 203.* But the allegation in this declaration is nearly as strong as an actual allegation of tender made, and the refusal averred comes within the case of *Jones v. Barkley, Doug. *66]* 684., and see *Kingston v. Preston*, cited therein, 689. Even *if the defendant were entitled to a tender, his refusal amounts to a dispensation of it ; and, after verdict, it must be taken, that the plaintiffs proved the matters averred. Moreover, here is an allegation, that possession was delivered ; and, wherever a contract is executed in part, it is no longer executory, and such part-execution amounts to an absolute acceptance of the plaintiff's title, *Boone v. Eyre, 2 W. Bl. 1312. S. C. 1 H. Bl. 273, n. a., Campbell v. Jones, 6 T. R. 570.* In *Wilks v. Atkinson*, Ante, vi. 11. S. C. 1 Marsh. 412, (an action for non-delivery of goods, according to agreement,) it was held unnecessary, after demand made, to adduce evidence in support of the averment, that the plaintiff was ready and willing to pay for the goods. It is unjust, that the defendants should retain the possession, and not do what he has covenanted to do ; his remedy is by action. [*Burrough, J. Maxwell v. Sharp, Sayer, 187,* was an action on an agreement to transfer stock, and the declaration was objected to, because it was not therein stated, that there was an actual transfer of the stock. But it was there held, that a sufficient tender was averred to support the action ; and, that these contracts were mutual and independent. So, here, the defendant is not to be put in possession of the legal estate, without paying the money.] Lord *Ellenborough's* expression, in *Phillips v. Fielding*, of the necessity of specifically setting out the title, is cavilled at in other courts, e. g. in *Martin v. Smith*, but at all events, in this case, the defendant has dispensed with it. Then, in the second count, an actual offer to convey, and refusal on the defendant's behalf, is answered. He cited *Vivian v. Shipping, Cro. Car. 384,* and *67] concluded, by observing, that the averment was *sufficient, and at all events, could not be taken advantage of, after verdict.

Best and Copley, Serjts., supported the rule. In this case each count forms a separate declaration, and is to be considered separately ; and upon general damages, if any one count cannot be supported, the judgment is gone. Both the counts in this declaration are bad : the second clearly so. In the first place, on a contract of sale, the vendor must show a title to sell ; in the next place, he must show, that, he tendered a conveyance : it is true, that by the conditions of sale, he is relieved from showing the title of the landlord ; but he does not show whether he is lessee or assignee ; whether there is even any lease, or whether he is in any way related to the premises. If a man simply undertakes to convey land, he thereby impliedly undertakes to convey a good title. It is quite nugatory for a man to go through the farce of conveying, when he has no title ; and, if he has no title, the purchaser is not bound to pay the money, nor can the vendor sue him for non-payment, *Phillips v. Fielding. [Dallas, J. Phillips v. Fielding,* was in a degree doubted in *Martin v. Smith* : Lord *Ellenborough,* there speaks of the rule in the former case as being the opinion

of Lord *Loughborough* only, and so speaks *Lawrence, J.*] *Phillips v. Fielding*, is not the decision of Lord *Loughborough* only, but of the whole court; and in *Martin v. Smith*, the only question was, whether it was necessary to set out all the particulars of the title. In *Luxton v. Robinson*, *Buller, J.*, says, "The plaintiff was to deliver possession; and, therefore, he ought to have shown, that he had a right so to do." If, in strictness, the title ought to be set out in detail, and, if it is not so set out, the verdict will cure the defect of a general averment; but, on this record, no averment of title whatever is made; it cannot, therefore, be assumed to be proved, that the *plaintiffs had a title; for nothing can be assumed as proved, which is not alleged. [*68 The second count is still more deficient. There is, indeed, in that count, an averment of an offer to convey and assign; but this is a sale of leasehold property, and no excuse is stated for not setting forth the title of the landlord; nor is there even an averment that the plaintiffs had a title. In none of the cases cited in *Serjt. Williams's* note to *Pordage v. Cole*, is any principle stated, which bears out the argument of the counsel for the plaintiffs. For, here, though the money is to be paid within twenty-eight days, it cannot be shown, that the plaintiffs were not bound to make a good title till the thirtieth day. If it could be so shown, then, and then only, the cases cited for the plaintiffs would apply. In *Jones v. Barkley*, *Glazebrook v. Woodrow*, 8 T. R. 366, and *Gooddisson v. Nunn*, 4 T. R. 761, the conveyance was to be made on the same day; and it was held, that the conveyance must first be made or tendered, though the agreement was in the same terms with these. *Campbell v. Jones*, is entirely inapplicable to the present case; there, part of the covenant was to be performed on one day, and part on another; for the instruction in bleaching must be gradual, and Lord *Kenyon's* judgment proceeded on that ground. *Rawson v. Johnson*, and *Wilks v. Atkinson*, are with the defendant; for, in those cases, the plaintiffs had done every thing which, in the nature of the cases, they could be required to do. So in *Mazwell v. Sharp*, the plaintiff had done all in his power to transfer the stock; and in a subsequent case, *Merrit v. Rane*, 1 Str. 458, which was an action on an agreement for the transfer of stock, the plaintiff averred, that he attended all the while the books were open on the day on which the stock was to be transferred, but *that the defendant did not appear; the court there held, that if the defendant had been there to transfer, the [*69 plaintiff must have laid down his money, though not so as to part with it until transfer: and in the argument was cited *Turner v. Goodwin*, Fort. 145. S. C. 10. Mod. 154. In *Vivian v. Shipping*, the point of condition precedent was not decided, nor is it clear whether that case came on on demurrer or after verdict. [The court here observed, that, in the first count, there was an averment, that the plaintiffs were ready and willing to give and make to the defendant proper conveyances and assignments of the leases of the estate, and that the defendant refused to accept the same; that this averment, as the case stood, was, as they were then advised, sufficient, and that the first count was good. They directed the counsel for the defendant to confine themselves to the second count.] The second count is entirely defective, for there is not even a premise in that count, from which it can be inferred that the plaintiffs had a title; or from which a tender of a conveyance can be presumed. If an averment of actual conveyance is, strictly speaking, unnecessary, it is absolutely necessary for the plaintiffs to show, that they were ready and willing to convey; and not only to convey simply, but to convey at the time and place stipulated. No such averment appears on this count, not even that he offered to convey within a reasonable time. All the matters necessary to be proved will, after trial, be supposed to have been proved; but, if such matters be not averred, there could be no need to prove them; and, therefore, it cannot be inferred that they were proved, *Rushton v. Aspinall*, Doug. 679. The verdict, therefore, will not cure the second count. *Phillips v. Fielding*, is expressly with the defendant in this case, and *Callonel v. Briggs*, 1 Salk. 112, is strong to show, that performance

*70] must be averred and proved. Neither of the special counts state the plaintiff's title, nor a tender of the conveyance; the latter does not aver, the plaintiffs were ready to convey within a reasonable time; both are evidently bad, and the latter, at least, is pregnant with such defects, that it cannot be cured after verdict.

DALLAS, J., now delivered the judgment of the court. This was a motion in arrest of judgment. The declaration consisted of two special counts, and the common counts. To the special counts, objections have been raised. The first count, in substance, states that a leasehold estate was put up for sale, subject to certain conditions, of which one was, that the purchasers should have proper conveyances and assignments of leases, without requiring the lessor's title. What the buyer, therefore, did not stipulate for or require, the lessor was not bound to state. The want of such an averment, therefore, constitutes no objection. It was next urged, that the tender of a proper assignment was not alleged; and it is true, that such a tender is not alleged in terms; but the allegation is, that the plaintiffs were ready and willing to give a proper assignment, on payment of the remainder of the purchase money, according to the intent, tenor, and effect of the agreement; but, that the defendant refused to accept of such assignment, and to perform his agreement according to such intent and meaning. Now, the rule is clear, that, if performance of an act be rendered impossible by the default of the one party, it dispenses with the necessity of the other party's averment or proof of such fact; and, if that rule be applied to this case, the objection vanishes. There is, then, a substantial right of action on the record; and, whether the pleadings are so formally drawn as to be good on demurrer, it is not necessary now to consider: for this motion is in arrest *71] of judgment, when the omission of form, and even of substance, is aided by the verdict.

The second count differs from the first: in the second count nothing is said of the purchaser having conveyances, without requiring the lessor's title; but the agreement set forth is, that the one party shall assign, and that the other shall accept; and then comes an averment, not merely that the plaintiffs were ready and willing to convey and assign, as in the first, but that they actually offered to convey and assign, and that the defendant refused to accept. To this count it is objected, first, that there is no title specially set forth; secondly, that title is not even generally alleged; and, thirdly, that there is no averment of the actual tender of any conveyance or assignment: and, it is true, that title in the lessor is not alleged. It becomes, therefore, unnecessary to consider the distinction between title specially set forth and title generally alleged. If it be urged, that, under the facts of this case, such allegation would be necessary, and that the want of it would be bad on demurrer, the answer is, that we are now not to decide on demurrer, but on a motion in arrest of judgment; to that ground, therefore, and to that only, must our consideration be confined. And this makes it unnecessary to go into the various cases which have been cited; every one of which, if it were necessary to examine them, would be found to differ from the case before the court in many respects; but, for the present purpose, one broad ground of distinction is sufficient;—they were all cases on demurrer. Being so distinguished, I need not say that they depend, not only upon different, but upon opposite principles to those which govern the present case. On demurrer, in favor of correct pleading, every objection is to be strictly considered; after verdict, matter, whether of form or substance, is to be aided by the verdict *in *72] favor of the justice of the case. Confining ourselves, therefore, to the consideration of this point, as arising on a motion in arrest of judgment, it becomes necessary to refer to the agreement and breach, as stated in the second count of the declaration. The contract alleged is an agreement by the defendant to purchase, and by the plaintiffs to assign and to convey, a certain leasehold estate of them the plaintiffs; and, after verdict, it must be taken, that the contract alleged was proved. Nothing is said as to a title or right to convey: but,

it is insisted, that, in legal construction, an agreement to assign and convey imports a right to assign and convey. Be it so, for the purpose of argument; for, if such be the construction, which the law will put upon the contract, it must be taken, that the assignment offered was of such a description. It is sufficient to set forth in the declaration the agreement, in the terms in which it exists. The same construction must be applied to the contract, and to the statement of the contract in the declaration, and this is done in the present case. Supposing it necessary to prove, under such an agreement, an offer legally to assign, it must be taken, after verdict, that this was proved at the trial; inasmuch as, without such proof, in the present view of the case, the plaintiffs could not have recovered. As to the remaining objection, viz. the want of an actual tender, it will be sufficient to say, that the objection becomes weaker when applied to the second count than it was when applied to the first; for, in this second count is alleged an actual offer to convey by the plaintiffs, and an actual refusal to accept such conveyance by the defendant. What, therefore, has already been said on this subject, as applied to the first count, becomes much stronger as applied to the second. The case seems sufficiently clear; but, if any illustration be required, *it may be derived from *Mason v. Corder*,† [*73 the last case decided on this subject in this court. There, in an action upon an agreement to assign a lease, it was urged in arrest of judgment, that the plaintiffs should have averred and proved, not only that he was ready to make a good title; but, that it was in his power to have done so. A new trial was granted on the merits, so that the case did not turn on the point, whether the judgment ought to be arrested. But, in delivering the judgment of the court, *Gibbs, C. J.*, said, "The action cannot be maintained, unless the plaintiff did offer, and was able and showed that he was able, to do that for which he had agreed. Possibly the plaintiff may prove that circumstance on another trial which does not appear in this report, that the plaintiff was in a condition to procure and did procure that which he was bound to procure, the assent of the lessor." Now, it could not be done on a future occasion, if the want of such an averment would have excluded such proof: nor would it, on the same ground, have been proved on the trial had; and yet, for want of such proof the new trial was ordered. Without, therefore, being in terms averred, the ability to make is involved in the averment, of being ready and willing to make an assignment, and of having tendered and offered to assign, and becomes matter of necessary proof on the trial, to enable the plaintiff to recover. The rule being, that, whatever is sufficiently alleged to let in proof, and without which proof, the plaintiff must have failed, will be intended after verdict to have been proved; such intentment must be made in the present case, and, consequently, the plaintiffs are entitled to our judgment.

Rule discharged.

† *Ante*, vii. 9. S. C. 2 *Marsh.* 332.

•HOPKINSON v. BUCKLEY.

[*74

The court will discharge with costs a rule obtained on affidavits of a party, which are sworn before his own attorney in the cause. [5 *Ante* 89.]

VAUGHAN, Serjt., showed cause against a rule, which had been obtained by *Hullock*, Serjt., and insisted that it must be discharged with costs, as all the affidavits of the party, which were the foundation of the rule, had been sworn before his own attorney in the cause.

The *court* observed, that it was extremely wrong for the attorneys in a cause to act as commissioners in taking the affidavits of their clients, and gave judgment that the

Rule be discharged with costs.†

† [The same principle has been adopted in New York. See 12 Johns. 340. See also 3 D. & E. 403. Cun. Rep. 54. Wightwick 62. 3 Atk. 813.]

ANONYMOUS.

Fine amended by increasing the number of acres, the measurements on which the description of the number of acres were founded being wrong.

BEST, Serjt., moved to amend a fine, by increasing the number of acres, on affidavits, which stated that the deed to lead the uses, conveyed one-third of all that farm called *Finchley* farm, in the occupation of *George Dowling*; that correct fines had been levied of the other two-thirds, but that, in this fine, the measurements were wrong. He cited *Alexander*, demt.; *Bleasdale*, tent : *Harford*, vouchee. *Ante*, iv. 734.

By the court,

Fiat

75*]

*ANONYMOUS.

The documents relating to a recovery of premises in *Northumberland* did not reach *London* till the first day after *Easter* term; the mistake was not discovered, the proceedings went on in the subsequent *Trinity* term, and the recovery came to the cursitor's office in *Michaelmas* term following, when the court, upon motion, allowed the recovery to pass as of *Easter* term.

BOSANQUET, Serjt., moved, that a recovery might be allowed to pass as of *Easter* term last, under the following circumstances. The premises were in *Northumberland*, and the documents did not reach *London* until the first day after *Easter* term. The mistake was not discovered, but proceedings went on in *Trinity* term, and the recovery had now come to the cursitor's office.

By the court, after a remonstrance for not coming earlier in the term.

Fiat.

NOAKES v. SHIPMAN.

Fine more than a twelvemonth old allowed to pass without any special reason assigned.

BEST, Serjt., moved, as matter of course, that this fine should pass, being more than a twelvemonth old. No special reason was assigned, although the writ of covenant was returnable in three weeks of the *Holy Trinity*, in the 54th year of *Geo. 3*.

By the court.

Fiat.

*GIBSON v. BRAY et al., Assignees of MARKHAM, a Bankrupt.

[1 Moore 519, S. C.]

Goods were sent from *J. G.* in *London* to *M.* at *Sunderland*, accompanied with a letter expressing a hope that some of the articles would be approved of, and desiring to have those articles which were not approved of returned as speedily as possible. The letter contained an invoice, headed, "Mr. *M.* bought of *J. G.*," wherein the prices of the articles were set down, but not carried out. On the evening of the day of the arrival of this letter and these goods at *Sunderland*, the effects of *M.* were seized under a *f. fa.*; and on the following morning his shop was shut by the sheriff, and never re-opened. In an action of *trover* for these goods, brought by *J. G.* against the assignees of *M.*, who had been made bankrupt: Held, that the goods did not pass to the assignees under the stat. 21 *Jac.* 1, c. 19, s. 11.

THIS was an action of *trover*, for certain shawls and laces. At the trial before *Gibbs*, C. J., at the *London* sitting after the last term, it appeared, that in *November*, 1816, in consequence of a request made by *Markham*, a shopkeeper at *Sunderland*, to *Morgan*, the traveller of the plaintiff, a lace merchant in *London*, to procure for him a few high priced shawls, and other articles, the plaintiff, on the 11th of that month, selected and sent him some laces by the mail; and in a letter of that date, containing an invoice of the articles sent, apprised him that agreeably to his order, to Mr. *Morgan*, he forwarded, as per invoice annexed, in a small box, which would go off per that evening's mail; that he had charged the whole as low as possible, and hoped some of them would be approved; and that the bankrupt's orders would oblige the plaintiff; and, in a postscript, he requested to have returned what was not approved, as speedily as the bankrupt could with convenience.

The invoice contained in this letter was as follows:

*Mr. *Markham*

Bot. of *John Gibson*.

[*77]

917—1	5-4	Bla. lace shawl	-	-	£14	0	0
582—1	-	-	-	-	22	0	0
913—1	-	-	-	-	22	0	0
964—1	½	square	-	-	8	0	0
965—1	-	-	-	-	9	9	0
1795—1	-	Bla. lace scarf	-	-	10	0	0
7026—7	½	Bord.	-	-	0	13	0
1305—8	-	whit.	-	-	0	14	6

Box 20d. _____

Net money £ _____

The parcel enclosing the goods arrived by the mail, at *Sunderland*, on the 13th of *November* following, and was delivered to the bankrupt in the afternoon of that day; and, about the same time, he received by the post, the above-mentioned letter and invoice. On the evening of the same day, his goods were seized, under a *feri facias*, and on the following morning, his shop was shut by the sheriff's officers. On the 15th of *November*, the bankrupt executed an assignment of his effects, for the benefit of his creditors; and, on the 21st, a commission of bankruptcy issued against him, which was opened at *Sunderland*, on the 27th, and a provisional assignment executed on the same day. On the 24th of *December*, the defendants were chosen assignees. The plaintiff applied to them for a restoration of the lace, stating, that the goods had been received into the bankrupt's stock prior to the act of bankruptcy; and that they could not be given up, as they had been then sold with the bankrupt's stock

*78] It further appeared, that the box containing the lace remained *for some weeks unopened in the bankrupt's shop; and, that it was kept perfectly distinct from his stock. *Gibbs, C. J.*, expressed his opinion, that the goods were subject to the bankrupt's commission, and that the entering the prices short made no difference in the case, for the prices were the lowest prices at which the goods were to be sold, and the letter of the plaintiff only required that those goods, which were not approved of, should be returned. His lordship observed, that, in *Livesay v. Hood*, 2 Campb. 83, goods in the hands of a dealer upon sale or return were held to pass to the assignees of such dealer, when bankrupt, and, that these goods were under the control of the bankrupt. He, however, reserved the point, directing a verdict to be entered for the plaintiff, with liberty to the defendants to move to set it aside, and enter a nonsuit. Accordingly,

Vaughan, Serjt., on a former day, having obtained a rule nisi to that effect,

Best, Serjt., now showed cause. *Livesay v. Hood* and *Neate v. Ball*, 2 East, 117, are beside the present question, which cannot be considered one of goods sent on sale or return, under circumstances similar to those, which formed the foundation of those cases. The goods in this case arrived on the 13th; and, on the next morning, the bankrupt's shop was shut by the sheriff's officers, and the bankrupt had not from the first moment any power over the goods. The invoice has no sale prices carried out, nor are the goods sent to be all sold direct, as appears from the language of the letter of the 11th. The bankrupt *79] had a discretion to select such goods as suited *him, and to return the others; this discretion to select he never exercised, nor had he, at any time, the order and disposition of such goods: and, without goods are in the order and disposition of the bankrupt, mere possession of them will not subject them to the operation of the stat. 21 Jac. 1, c. 19, s. 11.—He cited *Atkin v. Berwick*, 1 Str. 165.

Vaughan in support of his rule. The goods were in possession of the bankrupt before his bankruptcy; they were sent on sale or return, and he had an option offered him, to be exercised by him: if he does not reject them, they are to be kept, and he does not reject them; he had, therefore, the order and disposition of these goods, which he might have sold on the morning after their arrival, and which the defendants as his assignees are entitled to retain. *Livesay v. Hood* governs the present case, which is, if possible, the stronger of the two; for the invoice in *Livesay v. Hood* is only headed "*J. Almon from Livesay & Co.*;" here the invoice is headed "*Mr. Markham bought of J. Gibson*," clearly showing, when coupled with the letter, that the goods were purchased by *Markham*, with a power of returning such as did not suit him, within a reasonable time.

DALLAS, J. The fallacy of my brother *Vaughan's* argument consists in supposing, that where goods are literally in the possession of the bankrupt, by means whereof a false credit may arise to the prejudice of others, who may be thereby imposed on, such possession is sufficient to bring the goods so possessed *80] within the range of the statute of *James*. Now, if mere possession *were sufficient, the possession of factors, trustees and others, would be a possession in the order and disposition of the bankrupt, which it clearly is not; and, therefore, the proposition, that a mere possession of goods will bring them within the order and disposition of the bankrupt is much too extensive. What are the words of the statute? "If any person or persons shall become bankrupt, and at such time as they shall so become bankrupts shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition as owners," then, the same shall be liable to the creditors of such bankrupt, 21 Jac. 1, s. 11. The true question, therefore, is, whether the bankrupt, having the goods in his power,

has taken upon himself the order and disposition thereof. Now, this is not a case of continual dealing, as was the case of *Livesay v. Hood*, where the parties settled their accounts monthly; but the goods here are sent and received on a special engagement, that *Markham* may return what is not approved within a reasonable time. It is urged, that *Markham* might have sold them on the morning after their arrival; he might have done so, and that would have been a sale within a reasonable time. But the next morning ended the trading, and he had not, therefore, a reasonable time wherein to judge what he would or would not take; or whether he would take any of them. I, therefore, think, that *Markham* had not bought these goods, that they never were in his order or disposition, and, consequently, that a property in such goods never passed to the assignees upon his becoming bankrupt.

*PARK, J. I am of the same opinion. But, be it understood, that we impugn not the cases of *Neate v. Ball*, and *Livesay v. Hood*, neither do we narrow the received construction of the statute of *James*. On reviewing the facts, I think, it will be found that there is no difficulty in the question. These goods are received by *Markham*, on the evening of the 13th, the shop is shut on the next morning, by command of the sheriff, who was in possession, and is never opened again. *Markham*, therefore, had never any opportunity of exercising the discretion delegated to him, as to the selection of what goods he should keep, or what he should return. If it be objected, that this view of the case brings us to a consideration of time, the answer is, that in all these cases the consideration of time forms an ingredient. In *Neate v. Ball*, Lord *Kenyon*, says, "that the bankrupt was to decide, immediately, whether he would accept or return the goods; but see what he did. He received them on the 19th of *February*, into his warehouse, and there kept them as his goods, until the 4th or 5th of *March*." In *Livesay v. Hood*, the goods had been in the possession of the bankrupt, for nearly a month; and *Lawrence, J.*, there said, speaking of such goods, "they appeared to the world as his property, and this reputed ownership was calculated to gain him a delusive credit, which it is the object of the statute to prevent." But, here, there is no pretence for saying, that a delusive credit could be raised; for the goods arrive on the eve of his bankruptcy, and he never selects one of the articles offered to his choice. The circumstances of this case, as I think, go far beyond those of *Neate v. Ball*, and *Livesay v. Hood*, and are such as, in my opinion, entitle the plaintiff to recover.

*BURROUGH, J. In *Horn v. Baker*, 9 East, 215, every case on this statute, which had previously been decided, was considered. None of those cases, nor do any of subsequent occurrence, touch the question now before the court; for the key to this case lies in the postscript of the plaintiff's letter of the 11th of *November*, "shall be very much obliged to have them returned, what is not approved, as speedily as you can with convenience." It is quite plain that *Markham*, was to have a reasonable time to choose, whether he would have all the goods or a part of them only. These goods are brought to him on the evening of the 13th; on the 14th, his shop is shut up by the sheriff, and there is an end of the bankrupt's power over them. He had not, then, a reasonable time in which to exercise his power of choice, nor did he exercise any power over these goods; and, therefore, I am of opinion, that this rule must be discharged.

Rule discharged.†

[†See 5 Barn. & Ald. 134. *Knowles v. Horsfall, et al.*]

*ROWE et al., Assignees of LANGE, a Bankrupt, v. PICKFORD, et al.

[1 Moore 526, S. C.]

A trader in *London* was in the habit of purchasing goods at *Manchester*, and exporting them to the continent soon after their arrival in *London*. The goods so consigned to him remained in the waggon-office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped.

A consignment of goods for the trader was delivered to the defendants on the 9th and 12th of *August*; on the 14th and 17th the goods arrived at the waggon-office of the defendants; on the 16th or 17th the trader became bankrupt; and, on the 19th, notice of non-delivery to the bankrupt was given by the consignor to the defendants, who, according to order, on the 21st delivered the goods to a third house: held, that the assignees of the bankrupt were entitled to recover the goods deposited with the defendants; and that the right of the consignor to stoppage *in transitu*, ceased on the arrival of the goods at the waggon-office of the defendants in *London*.

THIS was an action of trover, brought by the plaintiffs as assignees of *Lange*, a bankrupt, to recover the value of six bales of twist, delivered to the defendants as common carriers. At the trial of the cause before *Dallas, J.*, at the *London* sittings, after the last term; after the usual proof in bankruptcy cases, when it appeared, that the act of bankruptcy was on the evening of the 16th or the morning of the 17th of *August*, 1816, the following facts were given in evidence. The goods in question were delivered to the defendants at their warehouse at *Manchester*, on the 9th and 12th of *August*, 1816, by one *Paul Chappe*, the manufacturer and consignor, addressed to the bankrupt in *London*, who had been in the habit of purchasing *Manchester* goods through *Chappe*, and exporting them to the continent, on or shortly after their arrival in *London*. The bankrupt had no warehouse of his own in *London*, and the goods consigned or sent to him remained at the waggon-office of the defendants, until they were removed from thence by his shipping agent, for the purpose of being shipped. The bankrupt always received notice from the defendants of the arrival at their warehouse in *London*, of any goods addressed to him, and there they remained until an opportunity for shipping them presented itself; when

*84] *an order to take them away was given by the bankrupt to his shipping agents, together with the note which had been left with the bankrupt, informing him of the arrival of the goods. On the 14th of *August*, the clerk of the bankrupt received a notice from one of the defendants' porters, of the arrival of two of the bales in question; on receipt of which, the clerk went to the defendants' warehouse, saw the bales, and informed the warehouseman, that, he should give an order to the bankrupt's shipping agent, to come for them as usual. On the 17th of *August*, a similar notice was given by the defendants of the arrival at their warehouse, of the four other bales; and, in the afternoon of that day, the clerk went to the defendants' warehouse, and saw those four bales, but did not give any directions respecting them. On the 18th, the clerk met the warehouseman, and told him not to let the goods in question go without order: the carriage for these goods was not paid, and the shipping agent always paid the carriage when he took away the goods. On the 19th of *August*, the authorised agent of the consignor *Chappe*, gave notice to the defendants, not to deliver the goods to the bankrupt; on the 20th, *Chappe*, confirmed the notice of his agent, and ordered the delivery of the goods to Messrs. *Liebman & Co.*, to whom, on the 21st., they were, by the defendants delivered accordingly. For the plaintiffs, it was contended, that the consignor had no right to stop these goods as *in transitu*; such right being determined by the arrival of the goods at the warehouse of the defendants in *London*. For the defendants it was urged, that the goods were *in transitu* when the consignor gave the notice for non-delivery to the consignee. The jury found a verdict for the plaintiffs. *Dallas, J.*, gave the defendants leave to move to set aside the verdict, and enter a nonsuit, or to have a new trial. Accordingly,

**Lens*, Serjt., on a former day, obtained a rule *nisi*, to that effect. He cited *Hunter v. Beal*, 3 T. R. 466, n. and referred to the cases of *Mills v. Ball*, 2 B. & P. 457, and *Ellis v. Hunt*, 3 T. R. 464.

Vaughan, Serjt., was now about to show cause, but was stopped by

The court, who asked *Lens*, if he thought he could support his case of stoppage *in transitu*, after the goods had reached their final place of delivery; and observed, that this case must be governed by *Leeds v. Wright*, 3 B. & P. 320, and *Scott v. Pettit*, 3 B. & P. 469, in the latter of which it was held, that where a trader had no warehouse of his own, but used that of his packer, for receiving goods consigned to him, the *transitus* of such goods was at an end upon delivery of them to the packer. That the case of *Hunter v. Beal*, was only a question, whether a packer was an intermediate man, and wanted the material feature, which marked the present case; namely, the fact that the warehouse of the carriers was the place of final delivery; and moreover, that the impression in Lord *Ellenborough's* mind in *Dixon v. Baldwin*, 5 East, 184, appeared to be adverse to the decision in *Hunter v. Beal*. In *Richardson v. Goss*, 3 B. & P. 127, *Chambre*, J., said, that he was strongly inclined to think, that, if a man be in the habit of using the warehouse of a wharfinger as his own, and make it the repository of his goods, and dispose of them there, the journey would be at an end when the goods arrived at such warehouse: and, in *Scott v. Pettit*, 3 B. & P. 472, Lord *Alvanley*, said, he perfectly coincided with Mr. Justice *Chambre*, in that which he had intimated in the former case. Both these cases were recognised *in *Dixon v. Baldwin*, and there confirmed [*86 by Lord *Ellenborough*, 5 East, 185.

Lens, admitted, that he could not press the point; and the rule was

Discharged.



COPLAND Demandant; BIGG, Tenant; THOMPSON, and Wife, Vouchees.

Recovery amended by altering the words, "in the parishes of *Childerditch*, and *Brentwood*, in the county of *Essex*," to the words, "in the parishes of *Childerditch* and *Southweald*, in the county of *Essex*;" on the affidavit of the vouchee, that he was seised in tail of the premises, and directed his attorney to suffer a recovery of his lands in the parishes of *Childerditch* and *Brentwood*, of which he was seised in tail as aforesaid; but that it had since been discovered, that *Brentwood*, wherein a part of his lands was situate, was a hamlet in the parish of *Southweald*; and that he intended to suffer a recovery of so much of his lands as was since discovered to be within the parish of *Southweald*.—All the parties living.

BLOSSETT, Serjt., moved to amend this recovery by altering the words, "in the parishes of *Childerditch* and *Brentwood*, in the county of *Essex*," to the words, "in the parishes of *Childerditch* and *Southweald*, in the county of *Essex*." on the affidavit of the vouchee, that he was seised in tail of the premises, and that he directed his attorney to suffer a recovery of his lands in the parishes of *Childerditch* and *Brentwood*, of which he was seised in tail as aforesaid. But that it had been since discovered that *Brentwood*, wherein a part of his lands was situate, was a hamlet in the parish of *Southweald*, and not of itself a parish. And that he intended to suffer a recovery of so much of his land as was since discovered to lie within the parish of *Southweald*.—All the parties were living. He cited *Dowse* demandant, *Lloyd* tenant, *Reeve* vouchee, 2 B. & P. 578.

By the court,

Fiat.

*KING v. STEDDEL et ux.

Affidavit of husband and wife, that they both did appear at the bar; the officer said that he had written the names of the husband and wife; but the name of the wife appeared struck out in the *præcipe*, an act which the officer said he never did. The fine being only of the last term, the court refused to amend the caption by inserting the wife's name, and ordered that she should come up to re-acknowledge the fine.

In this fine, there was an affidavit of husband and wife, that they both were present and did appear at bar, but the secondary had counted at bar the husband only. The secondary said, that he had first written the names of the husband and wife; and afterwards, in the *præcipe*, the name of the wife appeared to have been struck out, which the secondary said he never did.

Best, Serjt., now moved to amend the caption of this fine, by inserting the name of the wife, which had been so struck out. But,

The court directed, that, as it was a fine of the last term only, the wife should come up to re-acknowledge the fine.

Rule refused.

STUBBS v. STEVENSON.

[1 Moore 530. S. C.]

A parish was situated in the conterminous counties of *S.* and *B.* The premises in this parish intended to be passed by a fine were situated in the county of *S.*, but were described as situated in the county of *B.* The court allowed the fine to be amended by substituting the county of *S.* for the county of *B.*

Best, Serjt., on a former day, had moved to amend this fine of *Hilary* term, 52 *Geo.* 3., by substituting the county of *Southampton* for the county of *Berks* *88] upon an affidavit, that the premises were situate within *Stratfield Mortimer*, the parish named, but that they were not situated in the county of *Berks*, but in the conterminous county of *Southampton*, the parish of *Stratfield Mortimer* running into both these counties. The parties were all living, and it was their intention, that the premises in question should pass. *Best* urged, that, under these circumstances, there could be no objection to the amendment, and

The court were inclined to allow the amendment, in order to give effect to the fine; as the parish in which the premises lay was not sought to be altered, and as the premises could not pass under the present description of them; but, on the statement of the officer, that such an amendment would be contrary to the former decisions in *Kinderley* demandant, *Domville* tenant, *Ante*, i. 257; *Wainwright* demandant, *Seagrave* tenant, *Ibid.* 538; and *Anonymous*, *Ante*, iii. 418; *Gill* plaintiff, *Yeates* deforciant, *Ante*, iv. 708, and *Rashleigh* demandant, *Leigh* tenant, *Ibid.* 855; they took time to consider till this day, when they allowed the amendment.

By the court,

Fiat.

*BLANCK v. SOLLY, et al.

[1 Moore 531. S. C.]

A ship freighted with timber, &c., by the agents of the defendants at *Dantzic*, and consigned to their house in *London*, was, on her arrival, and after part of the cargo had been delivered, seized by the revenue officers on suspicion that she was not *Prussian* built. The treasury, on petition, ordered the ship to be restored, on condition that the cargo should be exported, and on payment of a sum as a satisfaction to the seizing officers. This sum the master (plaintiff) paid, and the defendants accepted and exported the cargo: Held, that this conduct of the master sufficiently showed the voyage to be illegal, and that he had admitted such illegality so as to preclude him from recovering the freight.

ASSUMPSIT for the freight of staves, timber, and deals carried by the plaintiff, on board his ship, from *Dantzic* to *London*. At the trial before *Gibbs*, C. J., at the *London* sittings after last term, the following facts were proved. In *August*, 1815, the agents for the defendants at *Dantzic*, shipped a cargo of timber consigned to the defendants, on board the ship of the plaintiff, who signed a bill of lading, which stated that the ship was bound to *Sheerness* for orders, and that the timber was to be delivered as there ordered to the defendants or their assigns, they paying freight for the goods, at certain prices, in the bill of lading mentioned. The ship arrived at *Sheerness* with the cargo, which was ordered by the defendants to be delivered at the *Commercial Docks, Deptford*. The defendants entered the ship at the *custom house*, and the cargo was landed by them, in their names, at the *Commercial Docks*. On the day after the commencement of the delivery, the ship and cargo were seized in the *docks* by the revenue officers, on suspicion, that the ship was not *Prussian* built; and, therefore, incapable, under the navigation act,† of importing the produce of that country into *England*. The brokers of the captain and owners presented, with the concurrence of the defendants, a petition to the lords of [90 the treasury, who ordered the ship to be restored, on condition that the cargo should be landed, and warehoused for a period not exceeding six months, for exportation only, on payment of a satisfaction of 50*l.* to the seizing officers; this satisfaction was paid by the plaintiff, and the defendants subsequently accepted and exported the cargo. The order of the treasury being produced, *Gibbs*, C. J., directed the jury to find a verdict for the defendants, on the ground that the voyage being illegal, the plaintiff could not maintain an action for the freight. His lordship, however, gave the plaintiff leave to move to set aside this verdict, and to enter it for himself. Accordingly,

Vaughan, Serjt., on a former day, having obtained a rule *nisi* to that effect, being now called upon by the court, supported his rule. First, the order of the treasury, on which the defendants rest, is not an order of condemnation; it is not, therefore, conclusive evidence of the illegality of the voyage; and the payment of the satisfaction ordered, is a payment merely *pacis causa*, without any acknowledgement of the illegality of such voyage; and, merely to avoid a contest with the crown. Secondly, the entry of the cargo at the custom house here, which alone made the illegality, if any existed, was the act of the defendants: for, there is no illegality in the arrival of a ship at *Sheerness* for orders, at what place she shall deliver her cargo. The only document which the

† 12 Car. 2. c. 18. s. 8., by which it is enacted, that no sort of masts, timber, or boards, shall be imported into *England*, *Ireland*, or *Wales*, in any ship or vessel but in such as do truly and without fraud belong to the people thereof, and whereof the master and three-fourths of the mariners, at least, are *English*: except only such foreign ships and vessels as are of the built of that country or place of which the said goods are the growth, production or manufacture respectively, or of such port where the said goods can only be or most usually are first shipped for transportation, and whereof the master and three-fourths of the mariners at least are of the said country or place, under the penalty and forfeiture of the ship and goods.

plaintiff's ship had with her, was a bill of lading, stating, that she was bound to *Sheerness* for orders. Thirdly, to produce a condemnation, a suit on the part of the government should have been instituted; but no such suit has been instituted: and, fourthly, the defendants have accepted and disposed of the cargo, for which they now refuse to pay *freight. *Muller v. Gernon*, *91] Ante, iii. 394, relied on by the defendants at the trial, is beside the present case. There, the plaintiff sought to recover for freight on a voyage admitted to be illegal; here, is no admission of an act of illegality, nor can the order of the treasury be considered conclusive evidence of such an act.

DALLAS, J. This is a plain case. An action is brought by the master of a foreign ship, for freight on goods imported into this country by means of a voyage clearly illegal. On the arrival of the vessel at *Depford*, she was seized, but, it is contended by the plaintiff, that, as no condemnation has actually taken place, he is entitled to recover. If there had been a condemnation, it is quite clear, that the master could not have recovered for his freight, and, if there has been that, which is equivalent to a condemnation, his case fails him. Now, what are the facts on this part of the case? On the seizure of the vessel, a petition was presented to the lords of the treasury for her restoration; and the plaintiff himself interfered to prevent a condemnation, consenting to the export of the cargo within a limited time, on payment of a satisfaction of 50*l.* to the seizing officers. The only question to be considered is—whether this is not *prima facie* uncontradicted evidence of an admission by the plaintiff, of the illegality of the voyage. His conduct, in acceding to the terms ordered by the treasury, and thereby preventing condemnation, is, in my opinion, sufficient to prove the illegality of the voyage, and to deprive the plaintiff of his right to the freight.

PARK, J. The order from the lords of the treasury was not compulsory on *92] the plaintiff, who might have *disputed it, had he thought proper to do so; but, instead of doing this, he acquiesces in the terms imposed by the order. This conduct affords, therefore, an unqualified presumption, that the voyage was illegal. I cannot distinguish this case from the principle recognised in *Muller v. Gernon*; and, I am of opinion, that this verdict ought not to be disturbed.

BURROUGH, J. I am clearly of opinion, not only that this voyage was illegal, but, that, the plaintiff, by his acts, has admitted its illegality. He expected a detention, if not a condemnation of the ship; and was, therefore, ready to comply with the terms of the treasury order. The cargo was consigned to the defendants, who have been deprived of all benefit from the importation, for they are compelled to export that which they had probably bought for the home-market. Under these circumstances, therefore, I am of opinion, that the plaintiff is not entitled to recover.

Rule discharged.

Lens, Serjt., was to have shown cause against the rule.

FREE et al. v. HAWKINS.

[1 Moore 535. S. C.]

Assumpsit on a promissory note payable twelve months after date to the defendant, and indorsed by him as a security for the debt of the maker: Held, that the defendant was entitled to notice of non-payment by the maker; and, that evidence of a parol agreement at the time of making and indorsing the note, that payment should not be demanded till after the sale of the estates of the maker, could not be received as a waiver of the right to such notice.

ASSUMPSIT on a promissory note for 1000*l.*, made by Sir Robert Salisbury, in the usual form, dated the 3d of April, 1813, payable twelve months after date to the defendant, or order, and indorsed by the defendant to the plaintiffs. At the trial before Gibbs, C. J., at the London sittings after [93] last term, it appeared, that the plaintiffs, bankers in London, were correspondents with the house of Sir R. Salisbury & Co., which house was a country bank, and considerably indebted to the plaintiffs; upon their requiring securities from Sir R. Salisbury, ten of his friends, at his instance, engaged to endorse promissory notes of 1000*l.* each, at twelve months date, as a security for the debt so due from Sir R. Salisbury, to the plaintiffs. The defence to the action was want of notice of dishonor; whereupon, the plaintiffs tendered, as a waiver of such notice by the defendant, evidence of his admission, that he knew and expected, that the payment of the note was not to be enforced until after the estates of Sir R. Salisbury were sold, and only in the event of the proceeds of such estates not being sufficiently productive; and that, whatever might be the course of law, such was the understanding when the note was given; and that the defendant, only gave the note as a further and collateral security; and for the express purpose of allowing time for the sale of the estates. This evidence was rejected by Gibbs, C. J., who consequently directed a nonsuit.

Best, Serjt., on a former day, had obtained a rule nisi to set aside this nonsuit, and have a new trial, on the ground, that it was competent for the plaintiffs to show, that the note was not given for any valuable consideration, but merely as a guarantee, and so no notice was necessary.

Lens and *Pell*, Serjts., now showed cause. The case resolves itself into two questions; first, whether the evidence was properly rejected; secondly, whether, if it had been received, it would, under the circumstances of the case, so control the import of the note, as to render a notice of dishonor [94] unnecessary. As to the first point, on the face of the note, it appears to be an absolute unqualified promise of payment; the defendant is the payee, and has indorsed it over to the plaintiffs, and, before the plaintiffs can call on such a defendant for payment, the law directs, that they must give him notice of the dishonor by the maker. On the face of the note, then, the defendant is entitled to notice of dishonor; and the case of *Hoare v. Graham*, 3 Campb. 57, is a sufficient answer to the position contended for at the trial by the plaintiffs; namely, that they were at liberty to give in evidence a parol agreement, entered into at the time of making the note, which would operate as a waiver of such notice. In *Hoare v. Graham*, it was held, that, in an action on a promissory note, the defendant could not give in evidence a parol agreement, entered into when it was drawn, that it should be renewed, and that payment should not be demanded when it became due; and Lord *Ellenborough's* decision in that case has not been shaken, by any subsequent decision. So, here, evidence to control and contradict the express terms of the note, from the face of which no conclusion of the understanding between the parties can be drawn, was properly rejected. As to the second point, the case of *De Berdt v. Atkinson*, 2 H. Bl. 336, even supposing it to establish the injurious principle for which the plaintiffs contend, widely differs from the present case. There, the payee of a note

lent his name to give it credit, and to enable the maker to raise money upon it, well knowing, at the time, that the maker was insolvent; and, upon the ground of the payee's knowledge of such insolvency, notice of dishonor was dispensed with in that case. But, here, at the time of making the note, there is no *95] *insolvency of any of the parties. In *Leach v. Hewitt*, Ante iv. 731, it was held, that one, who, without consideration, but without fraud, indorses a bill in which both the drawer and acceptor are fictitious persons, is entitled to notice of dishonor; and, in that case, *Chambre, J.*, adopts Mr. *Barnes's* note on *De Berdt v. Atkinson*. Here, the maker of the note was an ostensible person, and the payee had a clear right of action against him upon his non-payment of the note; the application of the plaintiffs should have been made to the maker in the first instance, for the defendant's undertaking is merely to pay the note in default of payment by the maker. It is true, that, in *Bickerdike v. Bollman*, 1 T. R. 405, it was held, that if the drawer had no effects in the hands of the drawee, from the time the bill was drawn, it was not necessary to give the drawer notice of the dishonor of the bill; but *Le Blanc, J.*, in *Claridge v. Dalton*, 4 M. & S. 231, says "Every new case makes one regret that the rule in *Bickerdike v. Bollman*, for dispensing with notice, was ever introduced." In *Nicholson v. Gouthit*, 2 H. Bl. 609, it was held to be no excuse for not having presented a note in time for payment, that the defendant indorsed it to guarantee a debt from the maker; or, that the defendant knew, before it was due, that the maker could not pay it, and had desired a banker, at whose house it was made payable, to send it to him that he might pay it. The note, in the present case, is indorsed to the plaintiffs by the defendant, as a security for the debt of the maker; the defendant, therefore, is a mere surety, and where a mere surety for the maker of a note indorses such note, the indorsee is bound to give notice of dishonor to the indorser of the note before he can sue him with effect. The second point, therefore, taken by the plaintiffs falls to the ground, *96] *even if the defendant be mistaken in the view, which he has taken of the first point.

Best, in support of his rule. The plaintiffs do not impugn the case of *Hoare v. Graham*, for they do not seek to introduce the evidence tendered at the trial, for the sake of enlarging or contracting the instrument. In that case, the evidence contradicted the instrument which the defendant had signed: In this case, the evidence neither contracts, enlarges, or contradicts the instrument; but merely shows the intention of the parties. This note was not given in the ordinary course of trade, for the defendant indorsed it merely as a surety for Sir *R. Salisbury*, nor had he any effects in Sir *Robert's* hands at the time of making it. A notice of dishonor is required in the common course of commercial bills and notes; but the rule is widely different when applied to accommodation bills and notes. *Bickerdike v. Bollman* has not been over-ruled; and, unless *De Berdt v. Atkinson* be overturned, the defendant in this case cannot be held entitled to notice of dishonor; for the facts of both cases are similar. (*Park, J.*, *De Berdt v. Atkinson* has been shaken in every printed book, and in the practice of every one at the bar; but I do not say that the two cases are similar.) In *Leach v. Hewitt*, the bill of exchange appears to have been given in the ordinary course of trade: *Mansfield, C. J.*, there said, that the defendant had only placed himself in the common situation of an indorser, and the other judges do not sanction the adoption of the note on *De Berdt v. Atkinson*, by *Chambre, J.* In *Nicholson v. Gouthit*, *De Berdt v. Atkinson*, is neither mentioned, nor shaken; and to assimilate this case to *Nicholson v. Gouthit*, it should be shown, that the defendant had said to the plaintiffs, "you need not wait till Sir *R. Salisbury's* estates are sold, bring the note to me, and I will *97] pay it." The particular circumstances *of this case divide it from all those cases, where notes or bills have been given in the ordinary course

of trade; and the evidence tendered was admissible, because it was important for the decision of the matter under consideration.—*Best* cited, in conclusion, the case of *Rogers v. Stephens*, 2 T. R. 713.

DALLAS, J. I am of opinion, that the evidence tendered at the trial of this cause was properly rejected, considering the purpose for which it was offered, and the object to which it was intended to be applied. The plaintiffs, London bankers, were the correspondents of Sir *Robert Salisbury & Co.*, who were country bankers, considerably indebted to the plaintiffs, and ten gentlemen agreed to put their names each on the back of one promissory note for 1000*l.*, payable at one year, to be made by Sir *R. Salisbury* in their favor, and to be indorsed by each of them to the plaintiffs, as a security for the debt of the country bank. This was accordingly done. It is then said, that at the time when these notes were made and indorsed, it was mutually understood, that payment should not be enforced until Sir *Robert Salisbury's* effects were brought to sale, and that the plaintiffs entered into this contract with the defendant, with a full knowledge of all these circumstances. One thing is to be observed; if such were meant to be the understanding, it ought to have been expressed on the instrument; but it is not expressed; and, taking the instrument as it stands, it is a common promissory note, and requires that notice of dishonor should be given to the defendant in order to give the plaintiffs a right to recover against him. But, it is said, notice was dispensed with by the understanding which existed between the parties; to which the answer is, that if parties mean to vary the legal operation of an instrument, they ought to express such variance: if they do not express it, the legal operation of [98] the instrument remains. The effect of the evidence tendered would be to vary the note in question, and to control its legal operation; and such evidence, I think, is inadmissible. The case of *Hoare v. Graham* is similar to the present case, and ought to govern it. It was there held, that a party should not be permitted to give evidence of a collateral or concomitant circumstance; namely, that though the note was expressed to be payable on a certain day, payment was not to be called for on that day. If the clear principle, that what is expressed in writing, and that which is the best evidence of a contract, should alone constitute the contract, require any authority, the case of *Hoare v. Graham* confirms that principle. In this case, the defendant, being a mere surety, has a right to avail himself of the objection, which he has taken; and the case of *De Berdt v. Atkinson* is entirely different from the present case; for, there, the defendant lent his name to give credit to a note, all the parties well knowing at the time of the making and indorsement, that the drawer was insolvent. I am of opinion, on looking to the substance of this transaction, that the defendant was entitled to notice of the non-payment of the note by Sir *R. Salisbury*: that notice was not given; and, I think, that the Lord Chief Justice was right in rejecting the evidence tendered at the trial; and, that the nonsuit directed by him ought to stand.

PARK, J. I was of counsel in the case of *Hoare v. Graham*, and was assisted by a very learned man. We took the same objections, which the counsel for the plaintiffs in this case have taken; but we felt, that we could not answer the question put by my Lord *Ellenborough*, “What is to become of bills of exchange and promissory notes, if they may be cut down by a secret [99] agreement, that they shall not be put in suit?” It has been observed in favor of the plaintiffs, that they sought not by the evidence tendered at the trial, to contradict the note or limit the written contract; but, if I issue a promissory note payable at two months, and enter into a parol agreement, that the note shall not be put in suit, till the end of five years, or till the uncertain period of the sale of an estate, can it be contended, that such a parol agreement does not contradict and limit the written contract, into which I have entered? I am of opinion, that the defendant in this case was entitled to notice of the non-pay-

ment of the note; and, that the evidence tendered by the plaintiffs as a waiver of such notice was properly rejected.

BURROUGH, J. I am clearly of opinion, that the evidence offered at the trial ought not to have been received. Promissory notes are now placed on the same footing with bills of exchange; and, like bills of exchange, are transferable from man to man. The note in question is not an accommodation note, but the transaction is sincere; and the indorser of such a note is as much entitled to notice as the indorser of any other note. What is the nature of the evidence attempted to be introduced in order to affect this right to notice? Its nature is to show, that the note, though on the face of it payable at one year after date, is not to be paid till after Sir *Robert Salisbury's* estates are sold, whatever the distance of that event may be. The exception in respect of accommodation bills does not touch this case. In some cases the original vice of the note continues, and pursues it from hand to hand: but in this note there is no vice, and the indorser of it was entitled to notice of its dishonor by *the maker. *100] It would be of the most dangerous import, if evidence of this sort might be let in to cut down written instruments.

Rule discharged.†

† [See Mr. Howe's note to *Hoare v. Graham*, 3 Camp. 58, and the American cases there collected.]

TREUTTEL and WURTZ v. BARANDON et al.

[1 Moore 543. S. C.]

TROVER will lie for bills of exchange indorsed to an agent of the plaintiffs or order for their account, and deposited with the defendants by such agent, as a security for past and future advances by the defendants to him.

TROVER to recover the value of two bills of exchange: one drawn by *Garton* upon, and accepted by *Speare*, payable to *Garton's* order eight months after date, and indorsed, "Pay to *J. P. De Roure, Esq.,* or order, for account of Messrs. *Treuttel & Wurtz*:" the other drawn by *Creswick* upon, and accepted by *Speare*, payable to *Creswick's* order, nine months after date, with a similar indorsement. At the trial of the cause before *Gibbs, C. J.,* at the *London* sittings after last term, it appeared, that the bills had been deposited with the defendants by *De Roure & Co.,* the agents of the plaintiffs, but without their authority, as a security for cash advances made by the defendants to *De Roure & Co.* *De Roure,* who had become bankrupt, stated, that he received the bills for the plaintiffs whose agent he was, and indorsed them to the defendants, to whom he gave them as a security on his own account; that, when the bills were deposited, he was indebted to the defendants beyond the amount of such bills; and, that the defendants continued, afterwards, to advance money to him on the bills so deposited. It further appeared, that when *De Roure* received the bills on behalf of the plaintiffs, he wrote a letter of information to them, placed the *101] bills to their credit in *account, and continued to have transactions with the plaintiffs after that time. *Speare,* the acceptor, had failed, and his effects were in the hands of trustees.

On behalf of the defendants, it was urged, that the action was not maintainable. Because, though an agent or factor cannot pledge the goods of his principal, he may pledge bills of exchange indorsed to him as a receiver for his principal, provided there be nothing in the indorsement to restrict the negotiability: secondly, because there was nothing restrictive in this indorsement, for

the words, "Pay to *J. P. De Roure, Esq.*, or order, for account of Messrs. *Treuttel & Wurtz*," were only inserted to show, that, when the bills were paid, they should be carried, in the books of the acceptor, *Speure*, who had become insolvent, to the account of the plaintiffs, for the purpose of preventing confusion in *Speare's* accounts. *Gibbs, C. J.*, was of opinion, that *De Roure* had no right to indorse these bills to a stranger, that he had no right to deposit them, that their negotiability was restricted, and, that the defendants might well have collected from the special indorsement, that the bills were not the property of *De Roure*. The jury found a verdict for the plaintiffs.

Copley, Serjt., on a former day, having obtained a rule *nisi*, to set aside this verdict and enter a nonsuit, being now called upon by the court, supported his rule. These bills were negotiable; they might have been discounted; and, if they might have been discounted, they had been properly dealt with. These bills were in the hands of *De Roure*, who was not restricted from sending them into the market for the purposes of trade. In *Evans v. Cramlington*,† the defendant drew a bill on *Rider*, payable to *Price*, or order, for the use of *Calvert*. **Price* indorsed the bill to the plaintiff. *Rider* dishonored the bill. It was held that the plaintiff had a right to recover, *Price* having [*102 a right of transfer, and having indorsed it to him. In the present case, the indorsement makes the bill payable to *De Roure*, "for account of *Treuttel & Wurtz*." There is no dissimilarity between the cases; and *De Roure* had a right to indorse the bill to the defendants. If it be admitted that these bills might be discounted, why may they not be deposited as a security? what is the nature of this deposit? *De Roure* has a running account with the plaintiffs, paying and receiving money for them; this money he applies to the general purposes of business, and enters it in his accounts, as received for the use of those for whom he is agent. What difference is there between discounting the bills severally, and crediting the principals with the proceeds of each; and entering the whole amount to their credit? If the negotiability of these bills be conceded, it follows, that this case falls within the principles laid down in *Collins v. Martin*, 1 B. & P. 648; for the ground on which it was there held, that agents might pledge, for their own private purposes, bills of exchange in distinction from other property, was, that the bills of exchange were negotiable. The special indorsement could not mean, that *De Roure* should not negotiate them: it never could be intended, that the plaintiffs should actually possess them; for that firm could not have sued upon them, and, indeed, they are left for months in the hands of *De Roure* after his letter of advice to them. The legal property of this bill was in *De Roure*; it was indorsed to him or order, and was negotiable; he has indorsed it to the defendants, and, therefore, they are entitled to hold it.

**DALLAS, J.* It is not necessary, in this case, to dispute the soundness of the decision in *Collins v. Martin*; for, without doubt, if one [*103 deposit with his banker negotiable bills, and that banker, afterwards, deposit them with a third person, as a pledge for his own debt, the property in such bills will pass to the pledgee. But this is not a simple case of a bill-indorsed; but, *De Roure*, the agent of the plaintiffs, being indebted to the defendants, deposits with them these bill, which were, by the indorsement, made payable to him "for the account" of his principals. The defendants take from *De Roure* these bills as a deposit, expressly by way of security, and not by way of discount; and the question is, whether they did not take this deposit with sufficient notice, that the bills did not belong to him? I am of opinion, that the defendants had sufficient notice, that these bills were not his property; and I, therefore, think, that the plaintiffs are entitled to recover.

PARK, J. If our decision in this case broke in on the case of *Collins v. Martin*, I should hesitate before I gave my opinion. But the case is reduced to a

single point; namely, whether the defendants had not knowledge, when *De Roure* pledged these bills, that they were the property of the plaintiffs. Of that, I think, there can be no doubt; and, therefore, I am of opinion, that there is no ground for disturbing this verdict.

BURROUGH, J. There is a wide difference between bills of exchange discounted, and bills of exchange deposited. If the bills had been discounted and the money received, the amount would have been immediately entered into the account; but deposited as they were, had they failed, their amount would have been struck out. The bills, therefore, did not form a real item in the account.

Rule discharged.

In showing cause against a rule for judgment as in case of a nonsuit, an affidavit that the plaintiff did not proceed to trial according to notice, in consequence of the absence of a material witness, need not name the witness.

PELL, Serjt., on a former day had obtained a rule *nisi* for judgment as in case of a nonsuit, the plaintiff not having proceeded to trial according to notice. *Hullock*, Serjt., now showed cause upon an affidavit that the plaintiff had not proceeded to trial on account of the absence of a material witness.

Pell, in support of his rule, objected, that the affidavit did not name the witness.

Copley, Serjt., *amicus curiæ*, stated that *Heath*, J., once held the naming of the witness necessary; but, that *Gibbs*, C. J., in the last term, settled that such naming was unnecessary.

BURROUGH, J. It might be often very dangerous and inconvenient to name the witness.

Rule discharged.

WALLER, Demandant; HINDE, Tenant; BLAND, Vouchee.

In a recovery the demandant died before the return of the writ of seisin; the acknowledgment was taken at the *Cape of Good Hope* on June 9, 1817, and the writ of *dedimus potestatem* was tested on the 16th of January, 1817. The court refused an application to make the writ of entry returnable in one month of *Easter*, 1817, the writ of summons returnable in three weeks of the *Holy Trinity* following, to allow the tenant's appearance to be recorded as of *Trinity* term, 1817, and the recovery to pass as of that term.

BEST, Serjt., moved, that the writ of entry in this recovery be made returnable from the last *Easter* day in one month, that the writ of summons be made returnable *from the day of the *Holy Trinity* following in three weeks, *105] the tenant's appearance recorded as of *Trinity* term last, and that the recovery pass as of that term; upon an affidavit of the tenant, that the acknowledgment of the warrant of attorney of the vouchee was taken at the *Cape of Good Hope*, on the 9th of June, 1817, and that the demandant died on the 9th of July, 1817, which was before the return of the writ of seisin. The writ of *dedimus potestatem* was tested on the 16th of January, 1817. But,

The court rejected the application, and *Best* took nothing by his motion

Rule refused.

SANDERSON, Demandant; BESSANT, Tenant; PARTRIDGE the Elder, Vouchee.

The court refused to make an order compelling the amendment of a recovery suffered by an insolvent debtor.

BEST, Serjt., moved, that this recovery suffered by *Partridge* the elder, an insolvent debtor, might be amended under the compulsion of the court according to the insolvent act.

DALLAS, J. The court cannot interfere in this case; at all events, if any rule were granted, it ought to be a rule to show cause: but we will not even grant a rule *nisi*. We cannot make the order on the insolvent.

Rule refused.

Best then moved to make the writ of entry returnable in eight days of *St. Martin* in *Michaelmas* term last, and that the recovery might pass of the same term. The *writ of *dedimus potestatem* was tested on the 10th of *January*, 1816; the *præcipe* was returnable in eight days of *St. Martin*; [*106 there was no *teste*. He moved on an affidavit which stated, that the warrant of attorney was duly signed and acknowledged by *Partridge* the elder on the 27th *January* last, in presence of the deponent and *Charles Harvey Hodson* named in the writ of *dedimus potestatem*: that the affidavit of taking thereof was made on unstamped parchment, *Partridge* being an insolvent debtor, under an apprehension, that no stamp was necessary, the proceeding being to invest the property of the insolvent in his assignees; and, through press of business, the *dedimus potestatem*, warrant of attorney, and affidavit of due caption, escaped the memory of the deponent, and were not sent to his agent until about a week after the return of the *dedimus potestatem*. That in *Easter* term last, the agent returned the writ of *dedimus potestatem*, warrant of attorney, and affidavit of caption to the deponent, to be retaken, and the time in the writ of *dedimus potestatem* had been extended for that purpose. That *Partridge* was applied to, to sign and acknowledge a fresh warrant of attorney for suffering this recovery, which he refused to do. That the deponent thereupon directed his agent to return the *dedimus potestatem* and warrant of attorney with a new affidavit, on a stamp, of the taking and receiving the same, with instructions to his agent to get such recovery forthwith perfected.

Rule refused.

*CRISPIN et al. v. WILLIAMSON.

[*107

1 Moore. 547. S. C.]

The plaintiffs declared that they agreed to sell, and that the defendants agreed to buy, certain goods and merchandises, to wit, three hundred and twenty-eight chests and thirty half-chests of oranges and lemons, at and for a certain specified price, also laid under a *videlicet*. The contract proved was for three hundred and eight chests and thirty half-chests of *China* oranges, and twenty chests of lemons, without specifying price: Held, that there was no variance, the price and quantity being laid under a *videlicet*.

ASSUMPSIT to recover the difference between the invoice price of a cargo of oranges and lemons, shipped by the plaintiffs on account of the defendant, who rejected the cargo, which were sold by public auction, and the net proceeds of

the sale. The first count of the declaration stated, that, in consideration that the plaintiffs would bargain and sell to the defendant certain goods, to wit, three hundred and twenty-eight chests and thirty half-chests of oranges and lemons, hundred dozen baskets and twenty serons of almonds, at certain prices agreed on between them, amounting to a large sum, to wit, to 623*l.* 3*s.*, the defendant undertook and promised to accept a bill of exchange to be drawn by the plaintiffs upon him, payable at thirty days after sight, for the value or price of the goods so bargained and sold. The plaintiffs then averred, that they bargained and sold to the defendant the said goods; and, thereupon, drew upon the defendant a bill of exchange, for the value of the goods, and that the bill was duly presented to the defendant for his acceptance. *Breach*, that the defendant would not accept or in any way pay or discharge the bill, by means whereof, the plaintiffs were obliged to take up and pay the same, and had thereby lost and been deprived of the gain and benefit that would have accrued to them from the use of the bill, had it been accepted by the defendant. The second count stated, that the defendant bargained for and bought of the plaintiffs, and the plaintiffs at his request sold to him, certain other goods, to wit, three hundred and twenty-eight chests and thirty half-chests of oranges and lemons, twenty bundles of baskets, and twenty serons of sweet almonds, at and for a certain large price or

*108] sum, to wit, the price or sum of 623*l.* 3*s.*, to be delivered by the plaintiffs within a reasonable time, and, in consideration that the plaintiffs had undertaken to deliver the goods, the defendant undertook to accept them, and to pay the plaintiffs for the same. *Breach*, that though the plaintiffs were ready and willing, and tendered, and offered to deliver to the defendant, and requested him to accept and pay for the same, the defendant did not, nor would accept the same. There were other counts for goods sold and delivered, work and labor, and the money counts. At the trial before *Dallas, J.* (*London* sittings after last term) two letters from the defendant to the plaintiffs were put in, to prove the order for the goods. The first dated *London, July 19, 1816* was as follows: "In the expectation that you will ship us a cargo of fruit, that shall be equal in every respect to those shipped by your neighbor, we are induced to order a small cargo. We have, therefore, now to request, you will charter a small fast-sailing vessel, and load her, on our account, with about three hundred chests *China* oranges, fifty chests lemons, twenty serons almonds, fourteen bundles large, and six bundles small baskets. Understanding that vessels are very plentiful, and freight low in *Portugal* and *Spain*, we concluded you would be able to charter on much better terms than we could here; however, we have particularly to inculcate the necessity of our cargo being dispatched as early as possible." By the other letter, dated the 24th of *August, 1816*, the defendant informed the plaintiffs, that he had chartered a schooner, and directed them to put on board her, "three hundred and eight chests and thirty half-chests *China* oranges, twenty chests lemons, and the baskets and almonds ordered." The plaintiffs then proved the arrival of the schooner with the goods on board, as ordered by the last letter, and the presentment of a bill of exchange for 623*l.* 3*s.* to the defendant, who refused to accept it or take the goods. For the defendant *it was urged, that the plaintiffs could not recover on the

*109] contract, as stated: for the first count in the declaration was clearly bad, no evidence having been adduced of a contract by the defendant to accept a bill of exchange; and, there was a complete variance in both counts, between the contract laid and that proved, both as to quantity and description of goods. *Dallas, J.*, said, that he would not stop the cause on these objections, of which the defendant might have the advantage elsewhere: His lordship left the case to the jury, on a question raised by the defendant as to the merits of the fruit, and whether the order, as executed, was a substantial execution of the agreement; citing, as a reason for not stopping the cause, on the ground of the objected variance, *Gladstone v. Neale*, 13 East, 410. The jury found a verdict for the plaintiffs.

Best, Serjt., on a former day, having obtained a rule *nisi* to set aside this verdict, and enter a nonsuit;

Lens, Serjt., on a subsequent day, showed cause against the rule. There is no substantial variance in this case. The essence of the contract is, that, in consideration that the plaintiffs would sell certain goods to the defendant, he would buy them; and neither the quantity of the goods or the amount of the price, both being laid under a *videlicet*, need be exactly stated; for the substance of the contract is not varied by the quantity or price. If the plaintiffs had chosen to bind themselves in the declaration to a particular sum, it would have been different: if it had been necessary to render the sum certain, the placing such sum under an uncertainty would not have vitiated the declaration. It would have been a different case, too, if the plaintiffs had, in *per- [*110 formance of the order given, substantially varied from that order. But they have not done so: a specific statement of the quantity, then, was unnecessary, and the case of *Gladstone v. Neale*, is directly with the plaintiffs. That case justifies the deviation from a statement of actual quantities: for, there, the court held, that there was no material variance; and yet the bargain for hemp, in that case, was for a more definite and precise quantity than was the bargain for fruit here. Secondly, the plaintiffs might, in this case, recover under the counts for goods sold and delivered. A refusal to pay for and receive goods, will not make them the less sold and delivered; and, if it be urged, that the plaintiffs have taken them back and re-sold them; that was only done, because the goods being of a perishable nature, a sale was for the benefit of all concerned. As to any variance that may be urged between the chests of oranges and chests of lemons, there is nothing in it. An order for three hundred and eight chests of oranges and twenty chests of lemons would satisfy the allegation of three hundred and twenty-eight chests of oranges and lemons.

Best and *Vaughan*, Serjts., then supported the rule. The plaintiffs cannot recover in this case; for, the contract laid in the declaration is altogether different from that proved by the letters; and, from the letters alone can the contract be derived. In neither of the letters is it stated, that the defendant had undertaken to accept a bill for the amount of the order; the first count, therefore, is clearly void and insupportable. Nor will the second count avail the plaintiffs more upon examining the letters. In the first, the defendant requested the plaintiffs to charter a vessel on his account, and load her with *about* three hundred chests of *China* oranges and fifty chests of lemons: he could not know the exact size of the vessel; and, therefore, used the word *about*. But, *in [*111 the second letter, having chartered the schooner himself, he ordered a precise and definite quantity, namely, three hundred and eight chests and thirty half-chests of *China* oranges, and twenty chests of lemons; whereas, in the second count, the goods are described as three hundred and twenty-eight chests and thirty half-chests of oranges and lemons. The words in *Neale v. Gladstone*, on which the decision rested, were "*about* eight tons:" and, there, the precise quantity was never known or declared; how then can that case operate on the present, where the precise quantity was both known and defined in the second letter? The number of chests in the last letter being definite, is of the essence of the contract. If one has occasion for a specific quantity, neither more or less will answer his purpose; and, where the consideration or contract alleged is material, the stating it under a *videlicet*, will not shield the plaintiffs from the effect of a variance. If it could, the defendant might, in this case, be bound to receive one thousand chests of oranges, if the plaintiffs chose to saddle him with them, though he has ordered but three hundred and eight. It is said, that there is no variance between three hundred and eight chests and thirty half-chests of oranges and twenty chests of lemons, and three hundred and twenty-eight chests and thirty half-chests of oranges and lemons; but, it is not so; for, under the terms of the declaration might be implied, three hundred and twenty-eight chests of oranges and lemons mixed together, whereas distinct portions of each were

ordered. [*Burrough, J. In Durston v. Tuthan*, 3 T. R. 67. n., which was tried before *Buller*, at Taunton Spring assizes, 1788, the contract stated was, that, in consideration that the plaintiff would buy certain sheep for 54*l.* 11*s.* 6*d.* the defendant undertook that they were sound. The price proved was 54*l.* 12*s.* 6*d.* *Buller, J.*, nonsuited the plaintiff, because this price was not laid under a *videlicet*; but agreed, that if it had been so laid, the statement would *have sufficed. *Dallas, J.* The first count is clearly out of the case. *112] for there was no evidence of a contract to pay by a bill. The whole case, therefore, turns on the second count.]

DALLAS, J., now delivered the judgment of the court. In this case, the first count of the declaration is not sustained by the evidence; and if it be bad for one reason, it becomes unnecessary to examine others. It states, as part of the contract, an undertaking to accept a bill of a certain description. The contract proved contains no such undertaking. This, therefore, is a material variance. The second count, in substance, states, that the plaintiff agreed to sell, and the defendant to buy, certain goods and merchandises, namely, three hundred and twenty-eight chests of oranges and thirty half-chests of oranges and lemons. It then alleges performance on the part of the plaintiff, a tender to the defendant, and a refusal by him to accept, being therefore, in substance, a count for goods bargained and sold. The quantity is stated under a *videlicet*; and the variance insisted upon is, first, that the order was for one hundred and eight chests of oranges, not one hundred and twenty-eight; and, next, that the order was as to chests and half-chests of oranges singly, and not of oranges and lemons jointly. It is not necessary to go into all that is elementary on the office of a *videlicet*. A party may, in certain cases, impose upon himself the necessity of proving precisely what is stated, if not stated under a *videlicet*; in others, if laid under a *videlicet*, such proof will not be necessary; and, again, a statement under a *videlicet* will not dispense with the necessity of exact proof, where the thing so stated is of the essence of the contract. In this case, it is said, quantity is to be so considered. In a count for goods bargained and sold, it is not necessary to prove the quantity, if stated under a *videlicet*; but, on the trial, the plaintiff *113] must prove *performance of the agreement on his part. And so the plaintiff did in the present instance: the letter of advice, the invoice, the bill of lading, all sent to the defendant, and in evidence on the trial of the cause, exactly corresponded in respective quantities with the different articles ordered; and the bill of lading was indorsed over by the defendant himself, to enable the goods to be sold on account of the shippers. No objection, as to quantity, was made; nor could it be, for the order and the goods tendered exactly tallied and agreed. The objections raised by the defendant at the trial were, that the chests were improper in which the fruit was packed, and that the fruit was bad. On this the enquiry turned. Both points the jury found against him, and that, in all respects, the order was properly executed by the plaintiffs. In substance, therefore, they were entitled to recover; and the objection resolves itself into matter of form only. Still, however, if such objection be good, it must be sustained. But we think, that under the precise facts of this case, the plaintiffs were not tied down by the statement under the *videlicet*, and that the rule must consequently be

*LEE, et al., v. ZAGURY.

[1 Moore. 556. S. C.]

The defendant drew a bill of exchange on *A.*, which *A.* accepted, payable to the order of *B.*, who indorsed it to the plaintiffs. On the dishonor of the bill, the plaintiffs brought their action against the defendant, the bill being then held by the plaintiffs as agents of *B.* A former bill had been drawn by the defendant on *C.*, which at the time of its dishonor, was held by *D.*, who took it up, and having struck out his indorsement sent it to *E.* to be forwarded to *F.* for the purpose of receiving the amount from the defendant. *F.* indorsed it, being then overdue, to *B.* for a valuable consideration. *B.* demanded payment from the defendant, who drew the bill in question, as a substitution for the former bill, and delivered it to *B.* Before this latter bill became due, *D.* gave the defendant notice not to pay it: held, that this latter bill was the property of *D.*, and that the plaintiffs were not entitled to recover the amount of it from the defendant.

ASSUMPSIT on a bill of exchange drawn by the defendant upon and accepted by his brother, payable to the order of *Vidal*, who indorsed it to the plaintiffs. At the trial before *Gibbs, C. J.*, at the *London* sittings, after last term, the defence was, that the defendant being indebted to *Sebag*, the latter applied to the defendant to furnish him with money by means of the acceptance of a third person. The defendant, accordingly, drew a bill on one *Pinto*, payable to his own order. This bill was accepted by *Pinto*, and indorsed by the defendant to *Sebag*, with the understanding, that it was to be provided for by *Sebag*, who accordingly took it up; but, not until after it had been dishonored and protested. When this bill became due, *Sebag*, after paying it, struck out his indorsement and put it into the hands of one *White*, in *London*: requesting him to send the bill to his correspondents at *Marseilles*, to receive it from the defendant on *Sebag's* account. *White* sent the bill to *Ogilvie & Budd*, of *Marseilles*, who indorsed and paid it away after its maturity, to *Vidal*, for a debt due to *Vidal* from them. *Vidal*, demanded payment from the defendant, who, being threatened with arrest, drew the bill of exchange, on which this action was brought, on his brother in *London*, the amount of his second bill including interest and charges on the original bill, and delivered it to *Vidal*, in payment of the first bill. *Sebag*, before the bill became due, gave the defendant notice *not to pay it. A bill having been filed in the *Exchequer*, against the plain- [*115] tiffs, it appeared by their answer, that they received both the bills from *Vidal*, as his agents; that they gave no consideration for the bill in question; and, that, when the bill was dishonored, *Vidal*, was again debited with the amount. *Gibbs, C. J.*, left it to the jury to determine, first, whether the plaintiffs were the agents of *Vidal*, and secondly, whether the bill might not be considered as the property of *Sebag*. The jury found a verdict for the defendant, and *Gibbs, C. J.*, gave leave to the plaintiffs to move to set it aside, and to have a verdict entered for them on the second point; no doubt existing as to the first. Accordingly, *Vaughan, Serjt.*, on a former day having obtained a rule *nisi* to that effect.

Copley, Serjt., subsequently showed cause. The plaintiffs being the agents of *Vidal*, and holding the bill for him, stood in the place of *Vidal*; and could have no better title to the bill than he himself had. *Sebag* was in fact the owner of the bill, and had authority to intervene and prevent the defendant from paying it; though his name did not appear on the bill. A bill overdue negotiated and indorsed conveys no right to the indorsee which the indorser had not; *Vidal*, therefore had no more right to the first bill than *Ogilvie & Co.* had; the right of *Ogilvie & Co.*, was no more than that of *White*, which was only to get the money of the defendant for *Sebag*. *Ogilvie & Co.* having received this bill for the mere purpose of enforcing payment, *Vidal*, though taking it of them without knowledge of that fact and for a valuable consideration, takes it subject to all the same equities which attached to it in their hands. *Vidal*, then, becomes in law and effect *Sebag's* agent to collect his money. Instead

of money he receives a bill of exchange from the defendant, being the bill, on which this action is brought; and this bill is *Sebag's* property, *and he
 *116] had a right to intervene to prevent the payment: for if a principal contract to sell goods by his agent, the principal being unknown, if such principal appear afterwards, and give notice to the purchaser to pay him and not the agent, should the purchaser pay the agent he will have to pay the principal over again. The plaintiffs were simply the agents of *Vidal*; and, thereupon, it is contended, that this becomes *Vidal's* action, who holds this substituted bill for *Sebag*. The security being negotiable in this case makes no difference; for all the parties to the transaction are the same, nor does the negotiability of an instrument vary its character from that of any other written contract, until such instrument is negotiated. If no one, save the plaintiffs being the indorsees, can bring an action on the bill, *Sebag* has nevertheless a right to interpose and prevent their suing in his name, as in point of fact they do; but *Sebag* might himself declare, that in consideration of his employing *White* as his agent to recover the amount of the first bill, *White* undertook to get from the defendant, either money or a bill; and if he got such bill, to indorse it over to *Sebag*.

Vaughan then, supported his rule. *Sebag* strikes his name off the bill before he passes it to *White*; how then can *Sebag* be prejudiced, if *White*, instead of treating the bill as if he were the servant of *Sebag*, put it into circulation? It does not appear what consideration was given by *Ogilvie & Co.*, and it gets to *Vidal*. The defendant does not object, that *Vidal* or *Ogilvie* have improperly obtained the bill; but he admits his liability, and desires time; and the effect of the transaction is, that, by taking another security from him, *Ogilvie & Co.* are discharged altogether. *Vidal* would be a great sufferer if this defence were to be let in. Whatever may be the rights of the parties on the original bill, *the act of receiving the substituted bill discharges the
 *117] other parties. It is assumed, that *Vidal* is the agent of *Sebag*; but no connection exists between them. Even if it had been so, *Sebag*, by taking his name off the bill, ceases to have a right to interfere, either with the original or the substituted bill. That second bill goes on to maturity, and the defendant says nothing about *Sebag*; on the contrary, his whole conduct forms a repeated recognition of his liability to pay. The court cannot hear *Sebag*, and will not sanction the attempt of the defendant to say, that a third person has an equitable interest in the bill. To the argument urged for the defendant, that, if one make a man his agent to receive money for him, and if such agent receive a bill, that bill becomes the principal's property, the plaintiffs agree; but, that argument does not hold when negotiable instruments get into the hands of strangers. If the plaintiffs retain their verdict, *Sebag* will not be injured, for he may have his action against *White*; his remedy is a simple one; if they do not retain their verdict, the decision of the court will lead to great fraud in the commercial world.

DALLAS, J. You really alarm us in all these cases, as if we were going to make revolutions in the commercial world: but, in this case it is confessed, that the plaintiffs are the agents of *Vidal*; this decision, therefore, will never touch any case but its parallel. Supposing *Sebag* to be ultimately intitled to the bill, which I think he is, and so is the decided opinion of my lord, will the plaintiffs consent to a *stet processus*? They shall have till to-morrow to make their determination.

Adjournatur.

*And now, *Vaughan* having intimated, that there was no acquiescence
 *118] by the plaintiffs to the offer of the court,

DALLAS, J., delivered judgment. This was an action on a bill of exchange, drawn by the defendant on his brother payable to the order of *Vidal*, who indorsed it to the plaintiffs. It is not necessary to travel through all the particulars of the various transactions between the different parties, for the

complicated statement of those particulars resolves itself into the single point, that the bill in question was held by the plaintiffs, as agents for *Vidal*, when this action was brought. This action, therefore, stands on the same ground, as if it were the action of *Vidal*; for, if the plaintiffs were to recover, their success would only render them accountable to *Vidal*. Now *Vidal* has no right to recover any thing on this bill, for the bill clearly belonged to *Sebag*. On this part of the case the facts were these. A former bill had been dishonored, of which *Sebag* was the holder; *Sebag* sent it to *White*, who forwarded it to *Ogilvie & Co.*, his agents, for the purpose of procuring payment from the defendant, who was the drawer of that bill. *Ogilvie & Co.*, in breach of the trust reposed in them, indorsed this over-due bill to *Vidal*, for a valuable consideration, who took it therefore, subject to all the equities to which it was liable in their hands. *Vidal* applied to the defendant for payment, and the defendant drew, in his favor, the bill, to recover the amount of which this action is brought by *Vidal's* indorsees. But *Vidal*, by getting possession of the second bill, could not vary the rights of *Sebag* to the first, who was entitled to whatever that first bill might produce; and as the second bill was the fruit of the first, which was *Sebag's* property, the second became the property of *Sebag*. It is well argued, therefore, that *Sebag* being the party beneficially *interested, is the party to whom the plaintiffs must account, if they recover in this [*119] action; and the question seems, then, to be, whether they shall be permitted to recover on their mere formal title, for the sake of exposing themselves to an action for money had and received at the suit of *Sebag*? We think that both law and reason are against such a permission; and are of opinion, under the facts of this case, that, after the notice not to pay given by *Sebag* to the defendant, the plaintiffs have no right to recover.

Rule discharged.

GAMMON et al. v. BEVERLEY.

[1 Moore 563. S. C.]

The defendant *B.*, with other underwriters, subscribed, in *August*, 1814, a policy on hides. The ship was captured, and the plaintiffs abandoned to the underwriters, and claimed a total loss. Shortly afterwards the ship was recaptured, and all the underwriters, in *October*, 1814, adjusted a salvage loss, deducting short interest, to 64*l.* 18*s.* 3*d.* per cent., save the defendant, who, in *February*, 1815, indorsed on the policy as follows: "Adjusted 33*l.* per cent. on account, upon my subscription to this policy, until the account of the proceeds of the goods insured can be made up, when a final loss is to be paid to the same amount as by the other underwriters; and, if the same exceed 33*l.* per cent., Mr. *B.* to pay the excess; if short, Mr. *H.* (the insured) to return the difference:" Held, in *assumpsit* on this policy, that this was a conditional, not an absolute adjustment; and that the plaintiffs not having proved their compliance with the conditions, were not entitled to recover.

ASSUMPSIT on a policy of insurance, effected by the plaintiffs as agents for *John Hodgson* on the 13th of *August*, 1814, to recover a salvage loss amounting to 64*l.* 18*s.* 3*d.* per cent. on hides shipped on board the *James* on a voyage from *Buenos Ayres* to *London*, and underwritten by the defendant for 300*l.* The defendant pleaded the general issue, and gave notice of set-off. At the trial before *Burrough, J.*, at the *London* sitting in this term, the following facts were proved. The *James*, having taken on board a cargo of hides at *Buenos Ayres*, sailed thence for *London* in *June*, 1814; and, on the 28th of *August* was captured by an *American* privateer. In *September* the plaintiffs, [*120] having received information *of the capture, abandoned the hides insured

to the underwriters, and claimed payment as for a total loss. In *November*, information came, that the *James* had been recaptured and carried into *Newfoundland*, where part of the hides were sold to pay the salvage and expenses; and the remainder of the cargo was forwarded to *England*. Notwithstanding the re-capture, the plaintiffs insisted on their abandonment, and the underwriters agreed to pay a salvage loss, deducting short interest; and, by a *memorandum* indorsed on the policy, dated *October 19th, 1814*, it appeared, that all of them, save the defendant, adjusted such loss to *64l. 18s. 3d. per cent.* payable in one month. The defendant refused, whereupon the plaintiffs brought an action against him, in *Hilary term, 1815*, for his subscription as for a salvage loss. Upon this, an arrangement took place, and the following indorsement was written upon the policy immediately below the subscriptions:

"Adjusted *33l. per cent.* on account, upon my subscription to this policy, until the account of the proceeds of the goods insured can be made up, when a final loss is to be paid to the same amount as by the other underwriters; and, if the same exceed *33l. per cent.*, Mr. *Beverley*† to pay the excess. If short, Mr. *Hodgson*‡ to return the difference.

"*London, 7th February, 1815.*

"In account with the plaintiffs.

"*Byrd Beverley.*"

The plaintiffs then proved the defendant's signature of this indorsement, and that all the other underwriters had paid a loss of *64l. 18s. 3d. per cent.*, before this indorsement was signed by the defendant, and closed their case. For the defendant, it was urged, first, that this was not a common, but a conditional, *121] adjustment; and *that it could have no effect till all the conditions therein had been performed, one of which was, that the account of the proceeds should be made up: and this had never been done. Secondly, that the plaintiffs should have declared specially on the *memorandum*, and that, not having done so, they must be nonsuited. Thirdly, that under the *South Sea Act*, the voyage was illegal. *Burrough, J.*, was of opinion, that though the underwriters had paid their adjustment before the signature of this indorsement, the plaintiff was entitled to recover; for the indorsement formed an agreement to pay what the other underwriters paid, and communications must have been made to the defendant, by which he must have known of the short interest. As to the third point, which was not much pressed, he was clearly of opinion, that the adjustment admitted the legality of the voyage. The jury found a verdict for the plaintiffs for *95l. 14s. 9d.*, being at the rate of *64l. 18s. 3d. per cent.*; but *Burrough, J.*, reserved the first and second points. Accordingly, *Best, Serjt.*, on a former day, having obtained a rule *nisi* to set aside this verdict, and enter a nonsuit or have a new trial,

Lens, Serjt., now showed cause against the rule. The defendant's main point rests on the supposition, that the plaintiffs cannot stand on the adjustment, but must prove the whole of the conditions contained therein; it must, therefore, be seen, whether the plaintiffs have not proved sufficient to enable them to stand on this adjustment. But it has been urged also, that the plaintiffs ought to have declared specially on the adjustment; such a proposition was never sanctioned yet. The adjustment, being agreed upon between the parties, authorises the plaintiffs to claim the difference as there stipulated; and the result is, that the defendant is bound to pay no more, than upon an investigation of the *122] subject, *the other underwriters pay; and they have paid the same sum as that which the plaintiffs now claim from the defendant on the only account which could be made up. Here is a total loss, and though there is a small reduction for salvage, yet the principal reduction is for short interest.

† The defendant.

‡ The insured.

The time when the underwriters paid, is wholly immaterial; for the foundation of the account by which the indorsers were to be bound whenever made, is the material point. The essence of the adjustment is, that the account of the proceeds shall be agreed to, not by the defendant but by the other underwriters. [*Park, J.* How is that a payment to be settled by account? No account has been settled. There is a great difference, in mercantile language, between a payment on account, and a payment on *an* account. The first is only a payment in part, subject to further enquiry; the second is a payment upon an admitted and specific statement. *Dallas, J.* "Until the account of the proceeds of the goods insured can be made up." This is clearly a stipulation, that a future account shall be made up, and that the defendant shall see and consider the account when it is made up.] The account is only one step, and is also an immaterial step. The substantial ground on which the plaintiffs rest is the fact of payment of a final loss by the other underwriters; and, if the defendant do not set aside that fact, by showing, that the payment was either erroneously or fraudulently made, they cannot be removed from their verdict.

Best and Hullock, Serjts., in support of the rule. First, as to the construction of this indorsement, no "account of the proceeds of the goods insured has been made up," nor does the defendant agree to pay on the same footing with the other underwriters, who pay as on a total loss, deducting short interest: whereas, the defendant denies a total loss, but says, virtually, that *he [*123 will pay on an average loss the same as the underwriters shall pay, if they pay on an account made up: but, if they do not pay on an account made up, then their payment is no guide to him. In examining the question, whether these conditions have been complied with, the date of this indorsement becomes material. A year before that time, the adjustment on the policy had been made by the other underwriters; and, after a lapse of a whole year, the defendant, who had not adjusted any loss, entered into this contract. It is clear, then, that he had not entered into any adjustment with the other underwriters; and that he was dissatisfied with the adjustment entered into by them. It is clear, that the parties contemplated an alternative; either, that the defendant might pay more than thirty-three *per cent.*, up to the amount paid by the other underwriters, if the account showed more to be due; or, if the account showed less to be due, then, that a return was to be made by the plaintiffs according to that account. It was always manifest, that thirty-three *per cent.*, was less than sixty-four *per cent.*; how, then could a return be possible, if the defendant paid on the same footing with the other underwriters? the plaintiffs insinuate, that an account must have been made up, because the other underwriters had paid the sixty-four *per cent.*: but this payment had been made before this contract was entered into, and, consequently, before the account could have been made up. Secondly, the plaintiffs cannot recover on this declaration. A common adjustment is certainly evidence of a liability to pay on a count on a policy: but this is not a common adjustment, but a special contract to pay on a given event: and the performance of the conditions of such contract should have been averred in the pleadings.

DALLAS, J. Though this case is not without difficulty, some points in it are quite clear. There can be no *doubt, that an absolute adjustment is evidence of the liability of the parties to pay the sum therein adjusted; [*124 subject, however, to be opened by evidence of mistake or fraud. If this adjustment were absolute, the defendant would, no doubt, be liable; but the question is, whether it be absolute or conditional; and, if it be conditional, whether the conditions contained in it have been complied with, as they must be in such a case to enable the plaintiffs to recover. Now, this adjustment is clearly not absolute; for, if the intention of the parties had been so to make it, it would have stopped at the word "policy;" but, as if the parties intended to prevent the possibility of such a construction, the *memorandum* proceeds: "Until the account of the proceeds of the goods insured can be made up, when a final loss

is to be paid to the same amount as by the other underwriters ; and, if the same exceed thirty-three *per cent.* Mr. *Beverly* to pay the excess ; if short, Mr. *Hodgson* to return the difference." On the face of the *memorandum*, and in terms, it is clearly prospective ; the word "until" is prospective, the word "can" is prospective : the only undertaking, therefore, is to pay a sum, such payment being prospectively suspended until the final making up of the account. Nor does its prospective import stop there : for it remains further to be seen, when the final account is made up, whether the plaintiffs are to pay or receive ; and this view of the case is confirmed, by looking to the fact, that all the other underwriters had adjusted in the preceding year. They had concluded themselves by an absolute adjustment ; if, therefore, it was meant, that the defendant should be guided by their acts, it would only have been necessary to refer to what they were to pay : in sense and in substance, the meaning of the *memorandum* is, that the defendant was to wait till the account was made up. The

*125] *memorandum* involves a condition precedent, which has not *been complied with on the part of the plaintiffs, and I, therefore, am of opinion, that the verdict given for them must be set aside and a nonsuit entered.

PARK, J. The language of the *memorandum* clearly shows, that something is to be done in future, and the dates throw considerable light upon this transaction. In *October*, 1814, the other underwriters had adjusted the loss at 64*l.* 18*s.* 3*d.* *per cent.*; whether they had paid this adjustment or no, signifies nothing. The defendant objected to this arrangement : now, if he agreed to adjust and pay as the others did, for what had he to wait ? He had only to pay 64*l.* 18*s.* 3*d.* *per cent.*, as they did. But what does he ? He adjusts thirty-three *per cent.* on account. And what says he ? Not, that he is liable at all events to pay 64*l.* 18*s.* 3*d.* *per cent.*, but that he contemplates the possibility of his payment being less than thirty-three *per cent.* It is, therefore, impossible, that the plaintiffs should be allowed to contend, that the defendant is precluded from shielding himself under his agreement, because the other underwriters have paid 64*l.* 18*s.* 3*d.* *per cent.* For his is a mere conditional adjustment, the conditions of which have not been fulfilled, and my brother *Dallas* has fitly observed, that this case is decided on the general law, which operates where conditions precedent have not been complied with. It becomes, then, unnecessary to consider whether or not a special declaration should have been framed on this conditional adjustment ; and I, therefore, shall give no opinion on that head.

BURROUGH, J. I had intended to say nothing on this case. But, after what has fallen from the bench and the bar on this point, it is a duty which I owe to my brethren on the bench and to the public, that I should say, I am satisfied

*126] that I was mistaken in the *view of the case taken by me at the trial, and, that the judgment of the court is, in my opinion, right.

Rule absolute.†

†[See *Phillips* on Insurance, chap. xx.]

SPARROW v. Sir WATKIN LEWES.

The defendant's bail in error ought to have justified on the 26th of November; but, being too late, the court permitted them to justify on the 27th. A *habeas corpus*, returnable on the 27th, had issued to the warden of the *Fleet* to bring up the body of the defendant, in order to charge him in execution; but the court held, that the operation of the *habeas corpus* was suspended by their permission; and, the bail having justified in pursuance of such permission, discharged the defendant.

In this case, a writ of *habeas corpus*, returnable on the 27th of November, to bring up the body of the defendant, had been lodged with the warden of the *Fleet*. The defendant's bail in error ought to have justified on the 26th, but they did not come till after the business of the court had commenced, and the court permitted them to justify on the following day; when they were accordingly justified. The plaintiffs, however, proceeded to charge the defendant in execution; and

Vaughan, Serjt., now opposed the bringing up of the defendant for that purpose.

DALLAS, J. If the bail had justified on the 26th, the proceedings would have been quite regular. On the 26th they do not justify, but the court gives them leave to do so, on the following day; and, on the following day, they do, with such leave, justify. This is the same as if they had justified on the 26th; and the *habeas corpus* was, therefore, suspended in its operation by this permission.

The court directed that, as to this suit,

The defendant should be discharged.

*WALBANCKE v. ABBOTT.

[*127]

[1 Moore 573, S. C.]

A writ was served at eight o'clock on the evening of the day on which it was returnable; and notice, dated the same day, of a declaration being filed conditionally on that day, was given on the following morning: Held, that there was no irregularity.

The defendant had been served with a copy of a *capias*, at eight o'clock in the evening of the 25th instant, returnable on the 25th, being the last return of this term; and on the following morning, with a notice dated the 25th, of a declaration filed conditionally against him on the 25th.

Pell, Serjt., now showed cause against a rule obtained yesterday, by *Best*, Serjt., calling upon the plaintiff to show cause peremptorily to-day, why the declaration, and all subsequent proceedings, should not be set aside for irregularity. *Pell* relied upon *Haynes v. Jones*, Ante iii. 404, and distinguished from that case the subsequent case of *Pope v. Turner*, Ante iv. 818; he admitted that there was an apparent contradiction between the marginal abstracts of those cases. He further observed, that if the defendant were correct in his application, he was, at all events, premature; and cited *Fletcher v. Wells*, Ante vi. 191. S. C. 1 Marsh. 550.

Best, in support of his rule, contended, that the service of notice of declaration was wholly irregular. The writ was not returnable till the 25th, and the notice stated, that the declaration was filed conditionally on the 25th, on which day the writ was served; and it was clear, that the declaration was filed, both before the service of the writ, and before its return. He urged, that *Haynes v. Jones* was overturned by the subsequent case of *Pope v. Turner*.

*DALLAS, J. The case of *Haynes v. Jones* is not overturned by that of *Pope v. Turner*. The notes of both cases are correct; but the mistake lies in the marginal abstracts; where it is not noticed, that the declaration in the one case was filed conditionally, and in the other case in chief. The case of *Haynes v. Jones* is very strong; for, there, the defendant was served at *Colchester*, fifty-two miles off, with a copy of a writ returnable on that day; and, at the same time, he was served with a notice, dated the same day, of a declaration having been filed conditionally against him. It was then held, that a writ may be served on the same day on which it is returnable, and that a declaration may be filed conditionally on the return day of such writ.

PARK, J. I am glad that the observation of my brother *Dallas* has cleared up the apparent inconsistency in the decision of the court, which arises from a mistake in the index to the *Term Reports*. The writ is returnable and served on the 25th, and the notice of the declaration is served on the 26th. The whole proceeding is perfectly regular.

BURROUGH, J. concurred.

Rule discharged with costs.

*129]

*In re JAMES WINTER.

An attorney had sent the money regularly for his certificates for three years by his clerk, who misapplied the money, and failed to purchase them. The court, upon application for his re-admission as an attorney, granted a rule absolute, in the first instance, conditioned for the production of the attorney-general's consent.

BLOSSET, Serjt., moved, that Mr. *James Winter* might be re-admitted an attorney of this court, on an *affidavit*, which stated, that he had for three years past sent his clerk with the money to the stamp-office to pay for his certificates for the years 1814, 1815, and 1816; but that his clerk had misapplied such money, and had failed to purchase his certificates for those years. At the stamp-office it was said, that the money could only be received for the certificate of the current year, which alone could be granted.

DALLAS, J. It has always been the practice here to have notice given, and to have the approval of the attorney-general. The court will grant the rule conditionally, upon the production of a brief of consent signed by that officer.

Rule absolute, *sub modo*.

RAGG et ux. Executrix, v. WELLS et ux. Executrix.

Assumpsit on a promissory note drawn by A., testator of defendant, payable to plaintiff B. Pleas, *non-assumpsit*, *Statute of Limitations*, and *plene administravit*. The two first issues were found for plaintiff; the last for the defendants. The prothonotary gave the plaintiffs costs on the whole and the *postea*; to the defendants he gave costs on the third plea only. On a motion that the prothonotary review his taxation, held, that the defendant having established an absolute bar, was entitled to the *postea* and the general costs: and that the prothonotary must review his taxation.

COPLEY, Serjt., on a former day had obtained a rule *nisi*, that the prothonotary might review his taxation in this cause; wherein the defendants

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had *pleaded *non-assumpsit*, the statute of limitations and *plene administravit*, to an action on a promissory note drawn by *Burrows*, the testator of the defendant *Ann Wells*, payable to the plaintiff *Ann Ragg*. At the trial, at the summer assizes for the town and county of the town of *Nottingham*, the issues on *non-assumpsit* and the statute of limitations were found for the plaintiffs; and the issue on the plea of *plene administravit* for the defendants. The plaintiffs obtained the *postea*, and the prothonotary, deeming that the plaintiffs were driven to trial by the defendants' pleading as above, held, that the plaintiffs were entitled to the whole costs in the cause, and the defendants only to the costs of the third plea. *Copley* cited *Hindsley v. Russell*, 12 East, 232, and *Garnans v. Hesketh*, Tidd. Pract. 1014. [*130]

Vaughan, Serjt., now showed cause against the rule, and urged that the taxation was right; for that the defendants, by pleading *non-assumpsit* and the statute of limitations, with *plene administravit*, had compelled the plaintiffs to go down to trial to try the two former issues.

Copley, in support of his rule contended, that the plaintiffs should have prayed judgment of assets *quando acciderint*, and that, then, as is usual, the defendants would have abandoned their pleas of *non-assumpsit* and the statute of limitations.

BURROUGH, J. This is not a question of the reduction of costs, but the prothonotary has given the main costs of the cause and the *postea* to the plaintiffs: whereas, the defendant, having established one absolute bar, is entitled to the *postea* and the general costs. The **postea* must be delivered to him, [*131] and the prothonotary must review his taxation.

The rest of the court concurring, the rule was made

Absolute.

COOKE v. TANSWELL.

[1 Moore 465. S. C.]

The court refused to make a rule for an attachment absolute against *A.* for the non-production of indentures according to their order, on his swearing that he could not comply with the order, not having the indentures in his possession; that he had never destroyed them; and that he had made diligent search for them, and repeatedly inquired for them, but could find no trace of them.

LENS, Serjt., showed cause against a rule *nisi*, for an attachment against the defendant for not producing certain indentures of apprenticeship, pursuant to an order of this court obtained by *Vaughan*, Serjt. It appeared on affidavit, that the defendant could not comply with the order, not having the indentures in his possession; that he had never destroyed them; that he had made diligent search for them, and repeatedly inquired for them, but could find no trace of them. *Lens* submitted, that the defendant never had the means of furnishing the plaintiff with these indentures, and that the defendant was willing to submit to any terms which the court might impose, should they be of opinion that the defendant ought not to take advantage of a *profert* by claiming *oyer*; but urged, that if the court held the defendant to be in contempt he never could purge himself; whereas the plaintiff might easily declare without a *profert*.

Vaughan, supported his rule.

DALLAS, J. The question is, whether we shall attach this defendant for non-production of an instrument, stated to be in his possession, according to the

*132] order of this court. He fully discharges himself from the *possession of it; and the plaintiff may declare on the deed as lost by time and accident, whereby the plaintiff will be relieved from all difficulty. There is no real difficulty in this case. These applications are themselves of novel introduction: the court is inclined rather to confine than to enlarge the practice, and certainly will not grant an attachment in this case. The defendant offers the plaintiff every indulgence to prevent his being barred of his action.

BURROUGH, J. If the defendant were to offer to traverse the fact of the indenture being lost, the court would certainly set aside such an issue on the application of the plaintiff.

DALLAS, J. We discharge the rule without qualification.

Rule discharged.

END OF MICHAELMAS TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
HILARY TERM,
IN THE
FIFTY-EIGHTH YEAR OF THE REIGN OF GEORGE III, 1818.

MEMORANDA.

In the last vacation, Sir *William Grant*, Knt., resigned the office of Master of the Rolls, held by him since the year 1801. and was succeeded by Sir *Thomas Plumer*, Knt., Vice Chancellor of *England*.

Sir *John Leach*, Knt., Chancellor to His Royal Highness, the Prince of *Wales*, Chief Justice of *Chester*, and one of His Majesty's Counsel, learned in the law, was appointed Vice Chancellor of *England*. And,

In this term, *William Draper Best*, Esq., one of His Majesty's Serjeants, having resigned the office of Attorney General, to His Royal Highness the Prince of *Wales*, was appointed Chief Justice of *Chester*.

*134] *RAY et al., Assignees of BROWN et al., Bankrupts, v. DAVIES, et al.†

[2 Moore 3. S. C.]

A. and *B.* being assignees under one commission of bankruptcy, and *C.* being assignee under two other commissions, cannot sue jointly; but the declaration should state what their respective interests are.

THIS was an action of trover, in which the plaintiffs sued as assignees of the estate and effects of *John Brown*, *William Clavey Brown*, and *John Morse*.

† *Giles*, C. J., was absent during the whole of this term, in consequence of continued illness.

At the trial before *Burrough, J.*, (at *Guildhall*, at the sittings after the last term,) it appeared, that three separate commissions had been issued against the bankrupts, who were partners at the time of the bankruptcy. The first commission was against *John Tozer*, and *William Clavey Brown*, trading under the name of *John Tozer & Co*; the second was against *John Brown*, *William Clavey Brown*, and *J. Morse*, trading under the firm of *John Brown & Co.*; and the third was against *John Morse* alone. It further appeared from the assignments produced, that *Edward Prosser*, and *William Farrer*, were the assignees of *J. Tozer*, and *W. C. Brown*, under the first commission; that *John Ray*, was the assignee of *J. Brown*, and *W. C. Brown*, and *J. Morse*, under the second commission; and also of *J. Morse*, alone under the third. *Burrough, J.*, considered the action not maintainable, and directed a nonsuit, on the ground that the action being brought by the plaintiffs, as assignees generally of *J. Brown*, *W. C. Brown*, and *J. Morse*, the declaration should have stated with precision what interest the plaintiffs actually had. They were assignees under different commissions of the separate property of the bankrupts, and were

*135] not, jointly or severally, the assignees *of the estate and effects of the bankrupts, as stated in the declaration.

Best, Serjt., now moved to set aside this nonsuit, and to have a new trial. The declaration states the three plaintiffs to be the assignees of three persons; and they are so, but under different commissions. *Ray*, is assignee of two under two commissions, and the other plaintiffs are assignees under the other commission. *Ray* has an interest in the effects of all the bankrupts, for they have neither of them any separate interest, being partners at the time of the bankruptcy. All the assignees have between them the whole interest. Formerly, as appears in *Lawson v. Lamb*, *Lutw.* 274. 277, it was usual to state at large the whole proceedings, and the mode in which the assignees acquired their interest; but that practice has long fallen into disuse, and been considered unnecessary.

DALLAS, J. It has been urged, that each of the plaintiffs has an interest in the same common fund, which enables him to maintain this action; and that it is not necessary to state on the record how they acquired the interest, if it appear that they have the interest. The question is, not whether there be a common fund in which the plaintiffs have a common interest, but whether they have a common title. On the declaration they appear to have a joint title. The evidence produced at the trial shows the fact to be otherwise, three separate commissions having issued. I am of opinion, that it was incumbent on the plaintiffs to have stated in the declaration the interest which they actually had.

PARK, J., concurred.

*136] *BURROUGH, J.* No case was cited at the trial in support of the position contended for by the plaintiffs. The declaration and the facts appearing in evidence are at variance. It is necessary that every substantial averment in the declaration should be proved,† and in this instance the averment is not true.

Rule refused.

† See *Streetfield v. Halliday*, 3 T. R. 799. *Scott v. Franklin*, 15 East, 428. *Stonehouse v. De Silva*, 3 Campb. 399. *Harvey v. Morgan*, 2 Starkie, 17.

HORSFALL v. HANDLEY.

[2 Moore. 5. S. C.]

An action for money had and received cannot be maintained against a church-warden to recover back dues, which, previous to the commencement of the action, had been paid over to the treasurer of the trustees of a chapel.

ASSUMPSIT for money had and received. At the trial before *Burrough, J.*, (*Westminster* sittings after *Michaelmas* term, 1817,) it appeared, that in the year 1801, the plaintiff purchased one of the vaults under *Pentonville* chapel, in the parish of *St. James, Clerkenwell*, which the trustees of the chapel were authorised to sell, by virtue of an act of parliament passed in the thirtieth year of the present reign. The purchase-money was paid to one of the church-wardens of the parish for that year, who gave a receipt for it; but no conveyance had been made to the plaintiff. In the year 1817, on the interment of the wife of the plaintiff in this vault, the sum of 9*l.* 18*s.* 6*d.*, for funeral dues, was demanded by the chapel clerk of the undertaker, who accordingly paid it, without requiring the particulars of such dues, and without any communication with the plaintiff. Upon the undertaker sending in his bill, the plaintiff applied to the chapel clerk for the particulars, who furnished him with an account, in which there were distinct charges for the ground, and for the church-wardens opening [*137] the vault. The plaintiff, conceiving that, inasmuch as the vault was his property, and as there was a charge for opening the vault, the church-wardens had no right to claim payment for the ground, made a demand upon the chapel clerk for the sum of 7*l.*, which had been paid on that account, who stated that he had paid it over to the junior church-warden. Upon an application being made to the defendant as senior church-warden, and on his being asked, if he had received the money, he replied, "yes, as we do all other sums." It appeared also, that by the custom of the parish, all moneys were received by the senior church-warden; and that the sum in question, had been paid over to the treasurer of the trustees of the chapel, in pursuance of the above mentioned act, before the commencement of this action. *Burrough, J.*, held the words of the defendant not to be an admission of the receipt of the money by him, but reconcileable with the fact, of his co-church-warden having received it, and paid it over to the trustees; and that the defendant had properly paid over the money to the treasurer of the trustees; and as the plaintiff had his remedy against the latter, directed a nonsuit.

Lens, Serjt., now moved for a rule *nisi*, to set aside this nonsuit, and have a new trial. He contended, that as the defendant received the money from the plaintiff, the circumstance of having paid it over to a third person before the commencement of the action, did not deprive the plaintiff of his remedy; and, that a payment made to one church-warden, was a payment to both. He cited *Edwards v. Hodding*, Ante, v. 815, in which case, the defence [*138] that the money had been paid over, did not avail, because the defendant had deluded the parties, and the court thought that he had not sufficiently apprised the plaintiff that the money had been paid over; and here the answer of the defendant was evasive.

DALLAS, J. Of the justice of this case, there can be no doubt. The defendant was placed in a public situation, where it became his duty to receive the dues, and pay them over to the trustees. He has, in fact, received money and paid it over, and justice requires that he should not be compelled to pay it again. The law, as well as the justice of the case, is with the defendant. The case of *Edwards v. Hodding* rested on this, that *Hodding* was consunt of the defect of title. But it has been said, that the answer of the defendant in this case was evasive. He had no intent to mislead, nor was there any reason why he should; and his answer is qualified, "I have received the money as I have

all other moneys." The plaintiff should have gone on to ask, whether the defendant still had the money? I am of opinion that the plaintiff was rightly nonsuited.

PARK, J. I am of the same opinion. The case of *Edwards v. Hodding* was decided at *nisi prius* before *Dampier, J.*, on the point put by my brother *Lens*; but, on motion, the court went on the other ground, that the same person was auctioneer and attorney, and had notice of a defect of title; and *Chambre, J.*, expressly says, "the defendant receives the money, knowing the condition that there should be a good title; and he knows that that condition is not performed: he nevertheless takes on himself, with this knowledge, to pay over the money, which he was not warranted in doing."

*139] *BURROUGH, J. I do not assent to the proposition, that payment to one church-warden, is payment to both. The plaintiff did not go far enough, he should have asked the defendant whether he had the money at that time?

Rule refused.†

† [See 4 Bur. 1984, *Sadler v. Evans*. 5 Bur. 2639, *Burrough v. Skinner*. Cowp. 565, *Buller v. Harrison*.]

MANT v. MAINWARING, HILL, et al.

[2 Moore 9. S. C.]

In an action on a joint contract against several partners, one of the defendants having suffered judgment to go by default, is not admissible as a witness to prove the partnership of himself and the other defendants without their consent, although the proposed witness is released as to all other actions, save that on which he is called to give evidence.

THIS was an action upon a special agreement entered into by certain persons, trading under the firm of *Samuel Hill & Co.*; and there was a count on a bill of exchange, drawn by *Samuel Hill & Co.*, upon and accepted by Messrs. *Mainwaring & Co.* Two of the defendants, *Samuel Hill* and another, had suffered judgment to go by default.

At the trial before *Dallas, J.*, at the adjourned sittings after last *Michaelmas* term, it was necessary to prove the partnership of all the defendants; and to do this *Samuel Hill*, one of the defendants, who had suffered judgment by default, was called to prove, that he and the other defendants were partners. His testimony was objected to, on the authority of *Brown v. Brown*, Ante, iv. 752, in which it was decided, that a witness who had suffered judgment by default, could not be called for the plaintiff to prove the partnership between himself and the other defendant because he had an interest in fixing the other defendant with a proportion of the debt; inasmuch as, having suffered judgment to go by default, if the plaintiff *failed in the joint action, he the witness would *140] be liable for the whole in a separate action. To get rid of this objection, a release was produced, by which all actions and causes of action against the witness, *Samuel Hill*, were released, except the very action before the court; and it was contended, that *Samuel Hill* had now no interest to give evidence against the co-defendants, and that all his interest was the other way; as, if he defeated the plaintiff's right in this action, he would never be liable in any other action; and if he, by his evidence, enabled the plaintiff to obtain a verdict, he would be liable to the plaintiff for the whole, or to the other defendants for contribution. *Dallas, J.*, considering the testimony of the witness inadmissible, rejected the evidence; and as, without his testimony, the partner-

ship could not be proved, directed a nonsuit, giving the plaintiff leave to move to set it aside, provided the court should think the evidence admissible. Accordingly,

BEST, Serjt., now moved to set aside this nonsuit, and have a new trial, on the ground that the evidence of the witness ought not to have been rejected, he having in reality no interest, save that, against which he was willing to give his testimony. He cited *Doe v. Green*, 4 Esp. 198, and *Norden v. Williamson*, Ante, i. 378, to show that there was no general rule that a party to a record could not be called as a witness, if he were willing to give evidence, and that the only objection was on the ground of interest; and he distinguished the present case from *Brown v. Brown*, the release in this case having removed the only ground on which the judgment of the court in *Brown v. Brown* proceeded.

*DALLAS, J. The single question at the trial was, whether all the defendants, who were six in number, were partners. Of the six, five [*141 were proved to be partners; but all attempts to fix the sixth having failed, another defendant, who had suffered judgment to go by default, was called; and his testimony being objected to by the others, the question was, whether he could be called against the will of his co-defendants. It appeared to me that he was interested; and on turning to the authorities, I found one precisely in point, (his lordship cited *Brown v. Brown*.) Generally a party to the record cannot be called as a witness, nor can he be called without the consent of his co-defendants. On the authority of two cases before Lord *Kenyon*,† and Mr. Justice *Le Blanc*,‡ I think *Hill* was not admissible as a witness, even with the release.

PARK, J. I have no doubt on this question. As a general proposition, a party to the suit is an incompetent witness. But let us consider whether the witness in this case be or be not interested. His judgment by default will operate against him only in the event of a verdict against the others; and, therefore, he cannot be called for them: and if called by the plaintiff, he may still give evidence for his co-defendants, and must, therefore, be considered as having an interest.

BURROUGH, J. The general rule is, that no party to an action can be examined but by consent: and all the parties to the record must consent; and without such consent none can be called. In this case, the co-defendants objected; and, therefore, the witness was properly rejected.

Rule refused.§

† *Brown v. Fox*, *Easter Summer Assizes*, 1789. *Phil. Evidence*, 63. 3d ed.

‡ *Chapman v. Graves*. 2 Campb. 333. n.

§ [See 6 Binney, 316, *Wakely v. Hart et al.* 10 Johns. 95, *The People v. Bill*. 10 Johns. 21, *Stockham v. Jones et al.* 3 Esp. Rep. 25, *Raventalt v. Dunning et al.*]

*MARCHANT v. EVANS.

[*142

[2 Moore 14. S. C.]

An action for work and labor cannot be brought for printing a work distributed weekly as a newspaper, unless the printer comply with the provisions of the statute 38 G. 3. c. 78. *Quære*, whether the action could be maintained by a printer of intermediate numbers. (the first and last numbers being printed by another person,) of a volume of a work published half-yearly, if the name of the printer of the first and last numbers was printed at the beginning and end of the volume.

ASSUMPSIT for work and labor, to recover the sum of 48*l.* for printing two hundred and fifty copies on stamped paper, and three hundred copies on un-

stamped paper, of six numbers of the Military Register, at the rate of 8*l.* for each number. Plea, *non-assumpsit*.

At the trial before *Dallas, J.*, at *Guildhall*, at the sittings after the last term, it appeared, that the defendant was the sole assignee of *Robert Scott*, the editor, proprietor and publisher of that register until his bankruptcy; and that from that time until *Scott* obtained his certificate, the work was continued, with the approbation of *Scott*, and printed by the plaintiff, by the directions of the defendant. It also appeared, that the numbers stamped were those intended for immediate sale, and that the unstamped numbers were intended to be published as half-yearly volumes. The defence made to the action was, that the publication in question was a newspaper within the 38 *Geo. 3. c. 78. § 1*,† and that

*143] "the plaintiff should have lodged an affidavit at the stamp-office, in compliance with that statute; also that he should have printed his name and place of abode in some part of the publication, in compliance with the tenth section of the same statute.‡ On these grounds *Dallas, J.*, directed a nonsuit, reserving the point for the determination of the court. Accordingly,

Vaughan, Serjt., now moved to set aside the nonsuit, and to have a verdict entered for the plaintiff for 48*l.* or 26*l.*, as the court should direct. He admitted that he could not contend against the construction put on the stat. 38 *Geo. 3. c. 77*, as applied to this case, but claimed the protection of the court for the plaintiff, under the 27th section of the 39th *Geo. 3. c. 79*,§ which he urged would entitle the plaintiff to a verdict for the three hundred copies printed on unstamped paper, and intended to form a volume, on the first and last leaves of which the name of the printer "*Scott*," appeared, the plaintiff having printed the intermediate numbers only, which were printed between the time of *Scott's* bankruptcy and the time of his obtaining his certificate, *Scott* having then

*144] resumed the work, and *having also printed the first sheets before his bankruptcy.

DALLAS, J. If there were the least doubt in this case, I, for one, should be disposed to grant a rule *nisi*, on the ground now for the first time urged, were I not afraid of establishing a dangerous precedent. No distinction was taken at the trial between the published and unpublished numbers, nor was the statute of the 39th *Geo. 3. c. 79*, alluded to; nor was any evidence adduced in support of this distinction. I, therefore, think that this rule ought not to be granted.

PARK and *BURROUGH, Js.*, concurred.

Rule refused. ||

† Which enacts, "That no person shall print or publish, or cause to be printed or published, any newspaper or other paper containing public news or intelligence, or serving the purpose of a newspaper, until an affidavit or affidavits, affirmation or affirmations, made and signed as hereinafter mentioned, shall be delivered to the commissioners for managing his majesty's stamp duties at their head office, or to some of their officer or officers in the respective towns and at the respective offices which shall be named and appointed by the commissioners for the purpose of receiving such affidavits or affirmations, (but which shall not be required to be upon stamped paper,) containing the several matters and things hereinafter for that purpose specified and mentioned."

‡ Which enacts, "That in some part of every newspaper or other such paper as aforesaid, there shall be printed the true and real name and names, addition and additions, and place and places of abode of the printer and printers, and publisher and publishers of the same, and also a true description of the place where the same is printed."

§ Which enacts, "That every person who shall print any paper or book whatsoever, which shall be meant or intended to be published or dispersed, whether the same shall be sold or given away, shall print upon the front of every such paper, if the same shall be printed on one side only, and upon the first and last leaves of every paper or book which shall consist of more than one leaf, in legible characters, his or her name, and the name of the city, town, parish, or place, and also the name, (if any,) of the square, street, lane, court, or place in which his or her dwelling-house or usual place of abode shall be."

|| [See 5 *Barn. & Ald. 335, Bensley et al. v. Bignold.* 17 *Mass. Rep. 253, Wheeler v. Russell*, and the cases there collected.]

SMITH v. HORNE et al.

[2 Moore 18. S. C.]

In an action of *assumpsit* against a carrier, evidence to prove negligence is admissible, and a gross neglect will defeat the usual notice given by carriers for the purpose of limiting their responsibility.

ASSUMPSIT to recover the sum of 67*l.* 9*s.* 6*d.*, the value of a parcel directed to Mrs. *Robinson*, at *London*, and sent by the coach of the defendants from *Worcester*. Plea, *non-assumpsit*.

The cause was tried before *Dallas*, J., at the sittings after the last term, when it appeared in evidence that the parcel arrived in *London*, but was lost in the course of delivery from the cart of the defendants, which was attended by one person only, whereas it was usual for the defendant and most other carriers to send two persons to accompany their cart. It appeared also that the servant of the plaintiff had knowledge of the usual notice which was in the office of the defendants, that they would not be answerable for goods above the value of 5*l.*, unless *entered and paid for accordingly. It was stated to the jury by *Dallas*, J., that the only question for their determination [*145] was, whether the defendants, by sending the cart attended by one man only, had or had not been guilty of gross negligence. The jury found that they had, and accordingly gave a verdict for the plaintiff for the whole sum sought to be recovered.

Best, Serjt., moved for a rule *nisi* to set aside the verdict, and have a new trial, on the ground, that the charge of negligence could not be imputed to the defendants; and that, although the jury had by their verdict found that the defendants had been guilty of gross negligence, still the plaintiff, (not having in the declaration laid the charge of negligence against the defendants,) could not be benefited by such verdict. He urged, that the present action was founded on contract, not tort, and clearly to be distinguished from the case of *Beck v. Evans*, 16 East, 244, where gross negligence was averred in the declaration. He cited also *Levi v. Waterhouse*, 1 Price, 280.

DALLAS, J. This was an action against the defendants as carriers. The only question in the cause was, whether the defendants had conducted themselves with gross negligence: the case went to the jury on that question only, and they found that there had been gross negligence. The evidence was, that most carriers sent two persons to deliver their parcels, and that the defendants in general sent two; but that, in this instance, they sent one only, who, while delivering some of the parcels, left the contents of the cart exposed to plunder. If negligence could be imputed to the defendants, I am of opinion, that evidence to prove it was admissible *under the declaration as now framed, and [*146] that the verdict of the jury should not be disturbed.

PARK, J. A case of grosser negligence than this I have hardly ever known. The doctrine of carriers exempting themselves from liability by notice has been carried much too far. I see nothing in the objections which have been urged by my brother *Best*, to induce me to think, that the verdict is not perfectly right.

BURROUGH, J. The doctrine of notice was never known until the case of *Forward v. Pittard*, 1 T. R. 27, which I argued many years ago. Notice does not constitute a special contract; if it did, it must be shown on the record; it only arises in defence of the carrier; and here it is rebutted by proof of positive negligence. I lament that the doctrine of notice was ever introduced into *Westminster Hall*.

Rule refused.†

† See *Wilson v. Freeman*, 3 Campb. 527. *Down v. Fromont*, 4 Campb. 40. *Birkett v. Willan*, 2 Barn. & Ald. 356. *Bodenham v. Bennett*, 4 Price, 31. [4 Barn. & Ald. 21. *Batson v. Donovan*. 5 Barn. & Ald. 53, *Garnett v. Willan*. Ibid, 342, *Sleat v. Fagg*.]

LOWES v. KERMODE.

[2 Moore 30. S. C.]

After issue joined, and notice of trial given, a cause was referred. It appeared doubtful, on affidavits, whether the award was made previous or subsequent to a revocation of the submission. The court refused to stay proceedings, but left the defendant to plead the award.

A RULE *nisi* had been obtained by *Pell*, Serjt., to stay proceedings in this cause, on the ground, that after issue joined, and notice of trial given, the parties had *agreed to refer the cause to arbitration, and that an award
*147] had been made.

Best, Serjt., now showed cause on affidavits, stating, that the plaintiff having been dissatisfied with the conduct of one of the arbitrators, application was made to one of them to deliver up the papers relative to the matters referred, at twelve o'clock on the day on which the award was made, which he refused to do until he should have made his award; whereupon the plaintiff executed a deed of revocation, and served it on the arbitrators before four o'clock in the afternoon of that day. *Best* contended that the time of making the award being the matter in dispute, a jury constituted the proper forum before which that question should be tried; for that, before them, the arbitrators might be called to prove the precise time of making the award. The court would, therefore, put the defendant to plead the award *puis darrein* continuance.

Lens and *Pell*, Serjts., in support of the rule, contended, that the court might interfere in a summary way.

Sed per curiam. What we should do in case of an undisputed award, is another question. Here, the award is disputed; and the court will not, upon motion, decide this controverted matter. The award must be pleaded, when the plaintiff may either reply or demur; but the question will most properly be disposed of by a jury.

Rule discharged.

*148]

*LEIGH v. SHERRY.

[2 Moore 33. S. C.]

The court will not change the custody of a prisoner where the crown is concerned, without the express consent of its officers.

PELL, Serjt., moved to commit the defendant to the custody of the warden of the *Fleet*, at the instance of the defendant, a prisoner in *Ilchester* jail for penalties at the suit of the crown. He had been brought up by *habeas corpus ad testificandum*, &c. The question for the court to decide was, whether the crown, by refusing to consent, could prevent the removal of the prisoner to the *Fleet*?

DALLAS, J. In a similar case before *Heath*, J., a few years since, I remember that he refused to interfere. The court cannot act in this case without the consent of the crown.

Pell took nothing by his motion.

See *Hodgson v. Temple*, Ante, v. 503, S. C. 1 Marsh. 166, Barnes, 385. *Sandys v. Spicey*, Barnes, 388. *Currie v. Kinnear*, 1 B. & P. 23.

TOMSEY v. NAPIER.

Semble, that the court will permit bail to justify, as tenant by the curtesy of lands in the *Isle of Man*, without affidavit or other evidence that the law of tenancy by curtesy prevails there.

ONE of the bail in this case stated himself to be tenant by the curtesy of lands in the *Isle of Man*. The court, without requiring any affidavit, or other evidence that the law of tenancy by the curtesy extended to the *Isle of Man*, deemed him sufficiently qualified to pass as bail, and were about to permit him to justify, but ultimately rejected him on the ground of a misdescription.

LEVY v. BARNARD.

[*149]

[2 Moore 34. S. C.]

The plaintiff, resident abroad, ordered A., his correspondent here, to effect an insurance on his account. A. was in the habit of employing the defendant as his broker, to effect insurances on his own account and for his correspondents abroad, and instructed him to effect this insurance, but did not mention the plaintiff's name. The plaintiff paid the amount of the premiums, 280*l.*, to A.; but that fact was not known to the defendant at the time of effecting the insurance. A. was indebted to the defendant in 21,000*l.*, including the amount of the premiums, and in the course of the next year paid the defendant 33,000*l.*, but incurred further debts, so as always, throughout the year, to leave a balance in favor of the defendant to a greater amount than the sum due for the premiums. The defendant received 385*l.* from the underwriters, on the loss, and passed the same to A.'s account: Held, that the defendant had no general lien, and that the particular lien was discharged, as the defendant must be considered as having been paid the amount of the premiums. If a broker, having a lien on a policy, part with it, his lien revives on repossession.

TROVER for a policy of insurance on goods in a ship called the *Aurora* at and from *Pillau* to *Swinemunde*. Plea, not guilty. At the trial before *Gibbs*, C. J., (*London* sittings after last *Trinity* term,) the jury found a verdict for the plaintiff, subject to the opinion of the court on a case of which the following is the substance. On the 23d of *December*, 1813, Messrs. *Spitta, Molling, & Co.*, of *London*, having received an order from the plaintiff, resident at *Berlin*, to effect an insurance for his account, on goods therein described, and valued at 2160*l.* per the ship *Aurora*, from *Pillau* to *Swinemunde*, in a sufficient amount to cover such interest, premiums, commission, &c. *Spitta, Molling, & Co.*, being merchants, and not in the habit of effecting their own insurances, or those of their correspondents, delivered to the defendant, an insurance broker, in partnership with his father (since deceased,) the following written order, requiring him to effect the insurance:

"Messrs. *John Barnard & Son*,
 "Please to insure and cover premium, commission, &c.

*I E 6 f 7, 9, 10, 13, 14, } 12 Casks. [*150
 15, 16, 18, 20, 23, 24.]

£

820 valued on sugars.
 1340 logwood, 3202 pieces.

2160 per the *Aurora*, Captain *C. Green*.
 Covered is 2490*l.* from *Pillau* to *Swinemunde*.
December 23, 1813.

Spitta, Molling, & Co."

The defendant's house was in the habit of effecting all the insurances for the house of *Spitta, Molling, & Co.*, and for their correspondents, by their order. The defendant's house effected the insurance in the name of *Spitta, Molling, & Co.*, and debited them with the premiums, and handed them the policy. *Spitta, Molling, & Co.*, transmitted an account of such premiums, and of their commission on the insurance to the plaintiff; and the plaintiff paid the amount to *Spitta, Molling, & Co.*, by a remittance inclosed in the following letter, but the defendant did not know, until after the insolvency of *Spitta, Molling, & Co.*, that they had been paid :

" *Berlin, 15th February, 1814.*

" Messrs. *Spitta, Molling, & Co.*, in London.

" I wrote to you on the 8th instant, to advise you that the *Aurora, Green*, master, was not yet arrived; her entering into a *Swedish* port having only been a report which did not prove to be correct, I requested you, therefore, to procure a new insurance. It is with great pleasure I received yesterday your letter of the 31st of *December*, inclosing insurance account on 2490*l.* upon my goods *per Aurora*, amounting to 280*l.* 3*s.*, against which you will do the needful to my credit with the enclosed."

*151]	*£	s.	d.	
	167	3	9	¹³ / ₂₈ January, three months' date, on <i>G. Jeffrey & Sons.</i>
	117	0	7½	¹⁰ / ₂₈ January, three month's date on <i>Philip & Lee.</i>

£284 4 4½ together on your place, first at Messrs. *Reid, Irving, & Co.*

(Signed)

Wolff Levy."

A loss being claimed by the plaintiff, the policy was in or about *June, 1814*, delivered by *Spitta, Molling, & Co.*, to the defendant, for the purpose of enabling him to procure an adjustment of the loss; and actions were, by direction of the plaintiff's son, who was then in *England*, commenced in the plaintiff's name, against such of the underwriters as refused to settle. Prior to the commencement of and pending such actions, various interviews took place between the defendant and the plaintiff's son, on the subject of compromising such loss; and, after various proposals had been made as to the amount of such compromise, three of the underwriters, whose subscriptions amounted to 550*l.*, agreed to compromise the loss claimed at seventy *per cent.*, making the sum of 385*l.* and settled the amount of such compromise on their respective subscriptions in account current with the defendant, who passed the same amount (less 1*l.* 18*s.* 6*d.* brokerage) to the credit of *Spitta, Molling, & Co.*, in their general account with him, under date of the 31st of *December, 1814*. The plaintiff, shortly after, drew for, and *Spitta, Molling, & Co.*, duly paid him the amount of such compromised loss.

When the policy was delivered up by *Spitta, Molling, & Co.*, to the defendant, to settle such compromised loss with the underwriters, the defendant knew *152] that the *plaintiff was the owner of the policy, and was interested in the proceedings thereof; and the plaintiff knew that the defendant was the broker who had been employed to effect the insurance. The defendant being requested by the plaintiff's son, prior to the insolvency of *Spitta, Molling, & Co.*, to deliver the papers relative to the insurance and loss to Mr. *Hall*, the plaintiff's attorney, in order that he might advise on the measures to be taken against the underwriters, he delivered all of them accordingly, except the policy, which he declined to part with.

There was an open account between the defendant's house, and *Spitta, Mol-*

ling, & Co. from the time of effecting the insurance for the plaintiff to the period of *Spitta, Molling, & Co.*'s bankruptcy.

On the 31st of *December*, 1813, *Spitta, Molling, & Co.* were indebted to the defendant's house in 21,676*l.* on such open account, including the premiums of insurance *per the Aurora*. In the course of the next year, *Spitta, Molling, & Co.* paid to the defendant, or the defendant received, on account of losses and returns on insurances effected for them, the sum of 33,000*l.* and upwards, but the defendant's house, in the mean time, continued to effect other insurances for the house of *Spitta, Molling, & Co.* On the 31st of *December*, 1814, the defendant was a creditor of *Spitta, Molling, & Co.* to the amount of 6684*l.* on such open account, and, during all the time aforesaid, *Spitta, Molling, & Co.* continued indebted to the defendant's house, on the said account to a considerably greater amount than the premiums of the insurance in question.

Before the commencement of this action, the plaintiff duly demanded the policy mentioned in the declaration from the defendant, and the defendant refused to deliver it.

*The question for the opinion of the court, was, whether, under these circumstances, the plaintiff was entitled to recover. If the court should [*153 be of opinion that he was, the verdict for the plaintiff was to stand, otherwise a verdict was to be entered for the defendant.

Copley, Serjt., for the plaintiff. It is clear, that, under the circumstances of this case, the defendant must have known that *Spitta, Molling, & Co.* were acting, not on their own account, but merely as the agents of *Levy*. *Spitta, Molling, & Co.* were intermediate parties between *Levy & Barnard*, and agents for both, and were in the habit of handing over to *Barnard*, all the instructions to effect policies, which they received from their foreign correspondents. This was a sufficient indication to the defendants that *Spitta, Molling, & Co.* acted as agents, and not on their own account. *Maans v. Henderson*, 1 East, 335. In *Westwood v. Bell*, 4 Campb. 353, it is said by *Gibbs*, C. J. "The only question is, whether the broker knew, or had reason to believe, that the person by whom he was employed was only an agent." Here the question is whether there be any lien for these premiums. *Spitta, Molling, & Co.* were agents for the defendant, for the purpose of receiving the amount of the premiums from the plaintiff; payment to them was, therefore, payment to the defendant. In the open account, moreover, between *Spitta, Molling, & Co.* and the defendant, there was a balance of more than 11,000*l.* paid over by *Spitta, Molling, & Co.* to the defendant, and, therefore, these premiums having been included in that balance, must be considered as paid; and, therefore, the defendant could have no lien on the policy.

Bosunquet, Serjt., *contra*. This is completely a new attempt of the party insured, to get his policy out of the *hands of the broker. The court has always held, that he is not entitled to hold the policy in lien, for [*154 any thing more than the particular premium. Supposing that *Barnard* knew *Levy*, for whom he effected the policy, to be a foreigner, he still had a lien for his premiums; and *Whitehead v. Vaughan*, Cooke's Bankrupt Law, 547. 7th ed., proves, that, if a party once had a lien on an instrument, though it come back into his hands, after he had parted with it, even by the means of a strong manœuvre, he shall have the benefit of it, and the lien is revived. If then the lien revives, the only question is, "Has the premium been paid to the broker?" It is true, *Levy* remits the money to *Spitta, Molling, & Co.*, but of that circumstance *Barnard* was ignorant. It has been said, that *Spitta, Molling, & Co.* were the agents of *Barnard*, for the purpose of receiving this money. That is not so. The foreign merchant must employ a broker, and *Barnard*, was the broker employed by the plaintiff. Concerns of great magnitude existed on both sides, between *Barnard* and *Spitta, Molling, & Co.*, but there was always a balance against *Spitta, Molling, & Co.* to a greater extent than this premium. *Spitta, Molling, & Co.* have never made any appropriation of any

of the numerous payments made to this account. It is clear law, that the party receiving has a right to refer the payments to the debt for which he has the least security. *Newmarch v. Clay*, 14 East, 239, *Kirby v. Duke of Marlborough*, 2 M. & S. 18, *Bosanquet v. Wray*, Ante, vi. 597. S. C. 2 Marsh. 319, show the power of appropriating general payments.† Under these circumstances, the defendant has never received the money, either from the plaintiff, or from *Spitta, Molling, & Co.*, and is therefore entitled to have the verdict entered for him.

*155] *DALLAS, C. J. This case, certainly, is not very correctly stated, and the point to be considered by the court is very incorrectly stated: for it refers to the general and not the particular balance. It is clear, that all the premiums have been paid by the plaintiff, to *Spitta, Molling, & Co.* It is equally clear, that the broker had a right to retain the policy, until paid, against *Spitta, Molling, & Co.*, by whose order it was effected. The question therefore, is, whether he has been paid; for, according to the cases cited, the lien would revive, on re-possession of the policy. In the open account, the policies are included in the 21,676*l.*, and there is a sum of 33,000*l.* and upwards, *contra*. It, therefore, appears to me, that the money due for premiums was included in the open account, and paid, and, moreover, in this same account, the particular premium is smaller than the adjusted sum for the particular loss received by *Spitta, Molling, & Co.*, on the same policy. Under these circumstances, I am of opinion, that the defendant is not entitled to this lien, and that the verdict for the plaintiff must stand.

PARK, J., concurred.

BURROUGH, J. If the defendant, in this case, were allowed to retain the policy, he would put himself in a better situation than any other broker ever yet enjoyed. But, independent of that, under the statement of the account, I am of opinion, that the defendant has no right to retain his lien.

Judgment for plaintiff.

† [See *Clayton's case*, 1 Merivale 572. *Plomer v. Long*, 1 Starkie, 153. *Bodenham, et al.*, v. *Purchas*, 2 Barn. & Ald. 39.]

*156] *SHELDON et al., Assignees of the Estate and Effects of DE ROCHE et al., v. ROTHSCHILD.

[2 Moore 43. S. C.]

A. drew a bill on B. for 400*l.*, which B., who was not then indebted to A., accepted. B. afterwards became indebted to A. in 236*l.* 11*s.* 3*d.*, and then drew on him for 163*l.* 8*s.* 9*d.*, the balance of the 400*l.* and his last bill was sold to C. for its full value, to be paid for on a certain day. On that day B. committed an act of bankruptcy, and requested C. to keep the bill at the disposal of A. till B. had paid the bill for 400*l.*, as he was not entitled to the money until the bill for 400*l.* was paid. Three days after the bankruptcy, A., ignorant of that fact, accepted the bill, and afterwards paid the money to C., on an agreement that he should resist any claim of the assignees. The bill for 400*l.* at this time remained over due and unpaid in the hands of A., and B. was indebted to him in more than the amount of the bill in question: held, that the assignees of B. could not recover against C., he being in the same situation as A., who had a larger claim against the estate of B., this being considered a case of mutual credit between A. and the bankrupts.

ASSUMPSIT for money had and received. At the trial of the cause, before Park, J., at the sittings after last *Michaelmas* term, a verdict was found for the

plaintiffs for the sum of 163*l.* 8*s.* 9*d.*, with liberty to the defendant to move to enter a nonsuit, if the court should be of opinion that the action was not maintainable. On application to the court in *Hilary* term last, for that purpose the court directed a case, which was, in substance, as follows:

The plaintiffs are the assignees of *Rudolpha Tschiffely de Roche, John Perrin*, and *Henry Lewis John Samuel Rodolphus Rochas*, who became bankrupts, on the 20th of *February*, 1816, between the hours of ten and eleven o'clock in the morning, and a commission, dated the 3rd of *April*, was issued against them, under which the plaintiffs were duly chosen assignees.

Previous to their bankruptcy, the bankrupts had dealings with *Mr. Otte*, of *Hamburg*, and on the 1st of *January*, 1816, *Mr. Otte*, drew a bill on the bankrupts, for 400*l.*, payable two months after date, which the bankrupts accepted. At that time the bankrupts were not indebted at all to *Mr. Otte*, but they became indebted soon afterwards, to an amount of between 200*l.* and 300*l.* On *Friday*, the 16th of *February*, the bankrupts *drew on *Mr. Otte*, a [*157 bill of exchange, payable in marks banco, for the balance of what *Mr. Otte* would owe them, in the event of the bill for 400*l.* being paid when due. The bill was drawn, payable to the bankrupt's order, three months after date, and was by them sold on Change on the same day, and the defendant became the purchaser for the sum of 164*l.* 8*s.* 9*d.* sterling, to be paid for on the following *Tuesday*, the 20th of *February*.

Before the *Tuesday* came, the bankrupts found themselves embarrassed, and, in consequence, wrote to *Mr. Rothschild*, stating, that they should not call for the amount of the bill sold to him, as the money would not be due to them, as they would be unable to pay the bill for 400*l.*, drawn on them by *Mr. Otte*, and which would fall due the 4th of *March*. This communication was made to the defendant on the *Tuesday* morning, the 20th of *February*, before twelve o'clock, with an intention to place all the parties in the same situation as if the bill drawn on *Mr. Otte*, and sold to the defendant, had not been drawn at all, *Mr. Otte*, not having, in point of fact, accepted the bill, as it had not reached him in the intermediate time between the drawing of it on *Friday*, the 16th of *February*, and the countermand on *Tuesday*, the 20th of *February*. On the same day, the bankrupts wrote to *Mr. Otte*, at *Hamburg*, to the same effect, but, before the arrival of the letter, *Mr. Otte*, on the 23d of *February*, accepted the bill, and afterwards paid the amount of it, when due, to the defendant, on an agreement, that the defendant should resist any claim of the assigness, and that *Mr. Otte*, should indemnify the defendant in so doing. At that time, the first-mentioned bill for 400*l.* was over due and unpaid in *Mr. Otte's* hands, and the bankrupts were indebted to him upon it in more than the amount of the bill in question.

*The question for the opinion of the court was, whether the plaintiffs were entitled to recover the said sum of 164*l.* 8*s.* 9*d.*, as money had [*158 and received by the defendant to the use of the plaintiffs. If the court should be of that opinion, the verdict was to stand, if not, a nonsuit was to be entered.

Lens, Serjt., for the plaintiffs, contended, that the money was held by the defendant for the bankrupts, and was under their control, and, consequently, subject to the operation of the bankrupt laws. He cited *Willis* and *Freeman*, 12 East, 656.

Vaughan, Serjt., for the defendant, contended, that the plaintiffs could not have recovered against *Otte*, and, therefore, could not succeed in this action against the defendant.

DALLAS, J. This bill having been accepted by *Otte*, he, of course, became liable, but the money did not become due to the bankrupts, until payment by them of the bill of 400*l.*, which had not, at the time of the bankruptcy, become due; this was, in fact, a case of mutual credit between *Otte* and the bankrupts, previously to their bankruptcy. The plaintiffs could not have enforced payment against *Otte*; his claim, in respect of the bill for 400*l.*, would have been

a sufficient defence, and the present defendant has a right to stand in the same situation. It is quite clear, that the plaintiffs cannot be entitled to recover.

PARK, J., and BURROUGH, J., concurred.

Judgment of nonsuit.

*159]

*MERITON v. GILBEE.

[2 Moore 48. S. C.]

In avowing, as executor or administrator, under the statute of 32 Hen. 8. c. 37. s. 1., it is not necessary for the defendant to state for what term the tenant held the premises. *Quære*, whether the statute 32 Hen. 8. c. 37., applies to rents arising out of terms for years?

REFLEVIN. The defendant avowed, as administratrix of *William Gilbee*, deceased, that one *James Gilbee*, for the space of two years and a half, next before and ending on the 25th of *December*, 1809, and from thence until and at the time of the death of the said *William Gilbee*, held and enjoyed the dwelling-house and closes, in which, &c., as tenant thereof, to the said *William Gilbee*, by virtue of a certain demise, made to him the said *James Gilbee*, at and under the yearly rent of 280*l.*, payable half-yearly, on the 24th of *June* and the 25th of *December*. That *William Gilbee*, for and during all the time aforesaid, was seised in his demesne, as of fee, of and in the said dwelling-house and closes, and that he died, being so seised, on the 24th of *February*, 1810; and that on the 9th of *June* following, administration of his effects was duly granted to the defendant. That, because the sum of 611*l.* 4*s.*, parcel of the sum of 700*l.* of the rent aforesaid, for the space of two years and a half, ending on the 24th of *December*, 1809, and from thence until and up to the time of the death of the said *William Gilbee*, was due and unpaid to him from the said *James Gilbee*, and from and after the death of the said *William Gilbee*, until and at the said time, when, &c., was due and in arrear from the said *James Gilbee* to the defendant, as administratrix (the residue of the said sum of 700*l.* of the rent aforesaid, having been paid and satisfied) she, the defendant, as administratrix, well avowed the taking of the corn, cattle, and goods, in the declaration mentioned, in the said dwelling-house and closes, in which, &c., (the same being

*160] charged with the payment of the said rent, and *chargeable to the distress of the said *William Gilbee*, and before and at the said time, when, &c., continuing, remaining, and being in the possession of the plaintiff only, by and from the said *James Gilbee*, as his tenant thereof) and justly, &c., as for and in the name of a distress for the said sum of 611*l.* 4*s.*, parcel, &c., so due and in arrear as aforesaid; and which said sum of 611*l.* 4*s.*, still remains due in arrear and unpaid to the defendant, as administratrix as aforesaid. There was a second avowry, similar to the above, stating the yearly rent to be of the value of 290*l.* 8*s.* To the first avowry, the plaintiff pleaded, in bar, first, non tenuit, and, secondly, riens in arrear. There were two similar pleas to the second avowry, and the plaintiff pleaded, fifthly, to both the avowries, that the said *William Gilbee* being seised, &c., died intestate, whereupon the said dwelling-house, &c., descended and came to one other *William Gilbee*, as his son and heir at law; and thereupon the said *William Gilbee*, the son, became seised of and in the said dwelling-house and closes in his demesne, as of fee. The defendant added a similiter to the first four pleas, and demurred generally to the last; the plaintiff joined in demurrer. At the trial, before *Bosanquet*, Serjt., at the last spring assizes at *Chelmsford*, the plaintiff

having consented to strike out the last plea to which the defendant had demurred, without prejudice to the legal objections to the avowries, an order of *nisi prius* was made with the consent of the parties, that a verdict should be entered for the defendant, and that it should be referred to an arbitrator to ascertain the amount of the arrears of rent due at the time of the said *William Gilbee's* decease, and then remaining unpaid, and that the verdict should be entered for such sum as he should find to be due to the defendant. The arbitrator, accordingly, made his award, and found that the arrears of rent due to the said *William Gilbee*, at the time *of his decease, amounted to the sum of 167*l.* 4*s.*, and that that sum still remained unpaid. Judgment was accordingly [*161 signed for 167*l.* 4*s.*

Onslow, Serjt., in the course of the last term, had obtained a rule to show cause why the verdict and judgment should not be set aside, and judgment entered for the plaintiff, or why the last plea in bar, and the demurrer thereto, should not be restored, on the ground that the defendant, as administratrix, could not legally distrain, as this was not a case within the provision of the statute of the 32 *Hen. 8. c. 37. s. 1.*,† as not being a rent in fee for life or in tail.

Lens, Serjt., (*Best*, Serjt., was with him) now showed cause. The only question, in this case, is as to the form of the avowries; if they can be supported, the verdict and judgment must stand. It is contended, that *Sarah Gilbee* is not entitled to avow on account of the character in which she stands, the lease from *William Gilbee* to *James Gilbee* being only for years. But, for any thing which appears in their pleadings, the rent may as well have arisen out of a freehold interest as out of a term for years. *James Gilbee* may have held for life; it does not appear by what species of holding *James Gilbee* held under *William Gilbee*, it is not stated that it *was for years. [*Burrough*, J. [*162 Even if it was from year to year, these avowries would be sufficient.] The court cannot determine the case on mere presumption. There being nothing to show what holding this is, and that it is not a holding within the statute of *Hen. 8.*; there being one possible case in which the administratrix may not avow, and the pleas in bar not showing that this is that case, the avowries must be taken to be good. It, therefore, would be wasting the time of the court to discuss whether the statute of 32 *Hen. 8. c. 37.*, applies to this case.

Onslow, Serjt. Distress was not co-extensive with payment of rent, there must have been privity of estate or privity of contract; but by this statute the personal representatives of tenants in fee, or in tail, or for life, of rent services, rent charges, &c., may distrain, so long as the said lands, &c., continue in the seisin or possession of the tenant in demesne, &c. From the words of the avowries, it only appears that the intestate was seised in his demesne as of fee, not that the person distrained on was seised in his demesne. [*Burrough*, J. Demesne, in the statute, means only occupation: what reason is there why the statute should not extend to the case where the party, whose representative distrains, was seised in fee. This point was decided by *Lee*, C. J., in *Powell v. Killick*.‡] This case, which was merely ruled at *nisi prius*, has been shaken

† By which it is enacted, that the executors or administrators of tenants in fee simple, tenants in fee tail, and tenants for term of lives, of rent services, rent charges, rents seck, and fee farms, may distrain for the arrearages of all such rents and fee farms due to the testators in their lives upon the lands, tenements, and other hereditaments, charged with the payment of such rents or fee farms, and chargeable to the distress of the testator so long as the said lands, tenements, or hereditaments, continue, remain, and be in the seisin or possession of the tenant in demesne, who ought immediately to have paid the said rent or fee farm, or in the seisin or possession of any other person or persons claiming the said lands, tenements, and hereditaments, only by and from the same tenant by purchase, gift, or descent, in like manner and form as their said testator might or ought to have done in his lifetime; and the said executors and administrators shall, for the same distress, lawfully make avowry upon their matter aforesaid.

‡ 1 *Selv. Ni. Pri.* 5th ed. 664. n.

by contrary decisions. In *Renvin v. Watkin*,† it was objected, that there was not any privity of estate between the administrator and the lessor, and that the case was out of the statute 32 *Hen. 8.*, and 1 *Inst.* 162. *a.*; 4 *Rep.* 50.; *Cro. Car.* 471.; *Lutch.* 211., were there cited; the case, therefore, was *fully *163] looked into. In — *v. Cooper*, 2 *Wils.* 375, the court said there was no such thing as a rent seck, rent service, or rent charge, issuing out of a term for years. It must be apparent to the court that fealty is a rent service that is not provided for by the statute. All objections to the avowries are saved, and the avowries are bad in substance. They state that the defendant “well avows the taking the corn, &c., in the said dwelling-house and closes in which, &c., the same being charged with the payment of the said rent, and chargeable to the distress of the said *William Gilbee*.” They ought to have shown some holding; they ought to have shown how it was chargeable. The statute does not apply to this case.

PARR, J. As it does not appear on these pleadings whether the tenancy was for term for years, or for life, I do not feel called on to determine whether the case before *Lec*, C. J., is well decided, it is enough for me to say, that I think these avowries are sufficient.

BURROUGH, J. I, for one, am rash enough to say, that I think the case well decided.

Per curiam,

Rule discharged.

† 1 *Selw. Ni. Pri.* 5th ed, 664.

*164] *ALEXANDER, Tenant; PALMER, et al., Demandants; HOUSE and MARY STACY, Vouchees.

Recovery permitted to pass where the warrant of attorney did not state in what plea of land it was intended to operate, it being evident from the caption for what purpose the attorneys were appointed.

PELL, Serjt., moved that this recovery might pass. The supposed objection arose on the warrant of attorney. The *præcipe* was, “Command *James Alexander*, that he render to *Joseph Palmer*, *Joseph Tremlet*, and *Isaac Bryant*, eight messuages, &c.” Then came the warrant of attorney, in which the tenants appointed, in their stead, certain persons, their attorneys, to gain or lose in a plea of land, not saying between whom, which it ought regularly to do; but it was urged, that it must be seen by the caption in what plea of land it was that the warrant of attorney was intended to operate.

BURROUGH, J. It is apparent there for what purpose the attorneys were appointed.

Fiat.

DEES, Demandant; RANDALL, Tenant; GRIMES et al., Vouchees.

Recovery allowed to pass where the warrant of attorney was “put in the place of *A. B.* in a plea of land,” the words “to gain or lose” being omitted in the warrant of attorney.

ONSLow, Serjt., moved that this recovery might pass, the words “to gain or lose” being omitted in the warrant of attorney.

*BURROUGH, J. The attorney is put in the place of his employer ; and as he is made attorney in a plea of land, it cannot be but to gain or lose. Therefore, on the authority of *Foster, demandant*, Ante, vi. 373, it may be allowed to pass.

Fiat.

BROOKS, Assignee of CARBUTT, v. SOWERBY et al.

[2 Moore. 55. S. C.]

The acceptor of a bill of exchange, which is drawn and accepted, after the issuing of a commission of bankrupt, but before the commission is opened, or appears in the *Gazette*, is not protected by the statute 1 *James* 1, although he has not any knowledge of the bankruptcy or of the issuing of the commission, and pays the bill to a *bona fide* holder ; for the statutes 46 *Geo.* 3, and 49 *Geo.* 3, declares the issuing of the commission to be sufficient notice of a prior act of bankruptcy.

ASSUMPSIT for goods sold and delivered by the plaintiff, as assignee of *John Carbutt*, a bankrupt, to recover the sum of 95*l.* 4*s.* The cause was tried before *Wood, B.*, at the last assizes at *Lancaster*, when it appeared in evidence that the bankrupt, who resided at *Manchester*, sent goods to the defendants in *London* for sale, and drew a bill of exchange upon them for the amount, which purported to be dated on the 4th of *October* but was in fact drawn on the 10th, requesting the defendants to pay the same four months after date, to the order of the bankrupt. This bill the defendants accepted on the 30th of *October*. On the 27th of *August* preceding, the bankrupt had committed an act of bankruptcy, and a commission was issued on the 7th of *October* following, but was not opened until the 2d of *November*, and did not appear in the *Gazette* until the 5th. The defendants were not aware of the issuing of the commission, or of the state of the bankrupt's affairs. They paid the bill on the 7th of *February* following, to Messrs. *Greaves & Co.*, the holders of it. It was contended at the trial, on the part of the plaintiff, that, *as the defendants had accepted the bill after the issuing of the commission, the payment was not valid, [*166 as the 46 *G.* 3, c. 135, and 49 *G.* 3, c. 121, excepted payments made to a bankrupt after the issuing of the commission. It was urged, on the part of the defendants, that those statutes did not effect the statute of 1 *James* 1, c. 15. *Wood, B.*, held, that the statutes of the 46 & 49 *G.* 3, did not affect the statute of *James*, and the jury accordingly found a verdict for the defendants.

Blosset, Serjt., who now showed cause against a rule nisi to set aside the verdict, and have a new trial, which had been obtained by *Lens*, Serjt., in the last term, contended, that the only question for the court to consider was, whether the statute 46 *G.* 3, c. 135, by which it is enacted, that for certain purposes the issuing of a commission shall be notice of an act of bankruptcy, so as to avoid certain payments, shall control the statute 1 *James* 1, c. 15. He urged, that the defendants were ignorant of the bankruptcy and the commission at the time they accepted the bill, and continued so until it appeared in the *Gazette* ; that it could not be said that a commission taken out by a trader in *London*, and kept in his pocket six weeks, is notice of the bankruptcy to a trader at *Manchester* ; and that the defendants were protected by the statute 1 *James* 1, c. 15, and entitled to retain their verdict.

Lens, Serjt., in support of his rule, was stopped by the court.

DALLAS, J. The statutes of the 46 & 49 *G.* 3, enact, that the issuing of a commission of bankrupt shall be sufficient notice of a prior act of bankruptcy. Though the first section of the 49 *G.* 3, repeals so much of the 46 *G.* 3, as

*167] enacts, that the striking of a docket should *be sufficient notice; the second section of the 49 G. 3, confirms the provision of the 46, declaring the issuing of the commission to be such notice.

PARK, J. The 46 G. 3, made striking a docket notice, in case the bankrupt was afterwards declared a bankrupt. That provision was deemed too vague, and was repealed by the 49 G. 3; but the latter statute still left the issuing of the commission notice as enacted by the 46 G. 3.

BURROUGH, J., concurred.

Rule absolute.†

† [See further discussion of this question, *Post*. 783—S. C. 3 Moore 157; and in 4 *Barn. & Ald.* 523, where the Court of King's Bench reversed the ultimate judgment of the Common Pleas. See also *Coote* on Mortgages. 430.]

BAXTER, Tenant; BOWKER, Demandant; SWINFEN, Vouchee.

The court will not direct its officers to pass a recovery where there is a mistake in the form of the warrant of attorney.
Nor will it permit the same mistake to be rectified by amending the warrant of attorney.

THE warrant of attorney, instead of having prefixed to it the *præcipe*, "Command *Robert Baxter, &c.*," in the usual way, began thus: "*William Bowker, Gent.*, demands, against *Robert Baxter, &c.*"

Lens, Serjt., stated, that the officers would not suffer this recovery to pass, without the direction of the court, or the *allocatur* of a judge; and moved, that it might pass, inasmuch as the two forms were, in substance, the same, and both equally expressed the subject matter to which the warrant of attorney related.

DALLAS, J. I do not think they are; if the recovery will do without alteration you may take it at your peril. The carelessness in preparing the warrants of attorney *has become so frequent, that we are unwilling to grant any

*168] aid to the parties; and we will give no such direction.
Lens then moved to amend the warrant of attorney, by striking out the words "*William Bowker, Gent.*, demands against *Robert Baxter, Gent.*," and inserting the words "Command *Robert Baxter, Gent.*, that, justly and without delay, he render to *William Bowker, Gent.*" He admitted that he could not amend the act of the party, though he cited the case of *Wolley* demandant, *Burgh* tenant, *Bell* and wife, vouchees, *E. T.* 54 *Geo.* 3, where, on the motion of *Pell*, Serjt., for all parties, it was ordered, "that the record of the recovery, the exemplification thereof, and all the several entries and process to perfect the same, should be amended, by making *Burgh*, demandant, instead of *Wolley*, and *Wolley*, tenant, instead of *Burgh*, throughout;" but he distinguished this case, wherein he sought only to amend the caption or title of the instrument, which was no part of the act of the party.

The court, however, refused the application, saying they could not alter the warrant of attorney.

Rule refused.

*SMITH v. WALKER.

[2 Moore 64. S. C.]

The court will not grant a motion for changing the venue after plea pleaded. The plaintiff may retain the venue, notwithstanding a motion to change it, on undertaking to give material evidence arising either in the county laid or in a third county. Proof of letters containing the promise upon which the action is brought, written and put into the post-office in the third county, is sufficient to satisfy such undertaking.

LENS, Serjt., had obtained a rule *nisi* for changing the venue from *Middlesex* to *Wiltshire*, on the usual affidavit.

Best, Serjt., showed cause, on an affidavit, which stated, that the cause of action, which was a breach of promise of marriage, would be partly proved by letters written from *London* to *Salisbury*, and prayed to retain the venue in *Middlesex*, on an alternative undertaking to give material evidence in *London* or *Middlesex*, on the authority of *Hunt v. Bridgeford*, Ante, i. 259, *Savory v. Spooner*, *Neale v. Neville*, Ante, vi. 565. S. C. 2 Mars, 278. [*Burrough*, J. If the venue is *London*, and you show cause of action in *London*, you get rid of the rule altogether; if the venue is *Middlesex*, you get rid of it on the alternative undertaking.]

Lens, Serjt., in support of the rule. The two things must be kept distinct. Being able to give material evidence in *London*, when the venue is *Middlesex*, will not alter the matter. The cases cited do not apply; for no part of the cause of action arises in *London*. Letters from *London* do not show that any part of the cause of action arose in *London*. The promises were made in the letters, and the letters were put in the post; and if they had been taken out of the post, the promises might have been recalled. This cause of action in no degree arose in *London*, it did not arise until the letter was received; [*170 it, therefore, arose wholly in *Wiltshire*.

DALLAS, J. Suppose a copy of the letter to be made at the time in *London*, and retained; if the party to whom the letter was addressed does not produce it, you must subpoena the person who made the copy in *London*.

BURROUGH, J. It is the evidence, and not the cause of action, which must arise in the third county.

Per curiam. On the plaintiff's undertaking to give material evidence in *London*, the rule must be

Discharged.

On this day, the court having reconsidered the case, DALLAS, J. delivered judgment.

We think sufficient ground was not stated for making this application after plea pleaded, therefore, the rule must be discharged without any condition. But I add, that we think, that if the application had been made in time, we ought to have adhered to the rule laid down in *Neale v. Neville* and *Savory v. Spooner*; and that, in such cases, an alternative undertaking ought to be given to produce evidence arising either in the county where the venue is laid or in a third county. We have found, by looking into the affidavit of the party who made this application, that the plea was then pleaded; and, if we had at first observed that, we should not have granted the rule *nisi*.

Rule discharged.

*ANONYMOUS.

The court refused a *distringas* on affidavit, stating that it was believed the defendant kept out of the way to avoid process; that the officer having applied thrice at the defendant's house, was told each time by the servants that their master was not at home, that they did not know where he was, that he had been absent for months, and that he had not been at home since the officer called last.

PELL, Serjt., moved for a *distringas*. The grounds of belief, that the defendant kept out of the way to avoid process stated in the affidavit, being, that the officer had applied three times at the defendant's house, and was told each time by the servants, that their master was not at home, that they did not know where he was, that he had been absent four months, and that he had not been at home since the officer called last.

PARK, J. If he was absent before the process issued, he cannot be said to be out of the way to avoid service of it.

Per curiam,

Rule refused.†

† But see *Ante* viii. 57.

HARTLEY v. HODGSON.

[2 Moore 66. S. C.]

In an action on a recognizance of bail, taken before a commissioner in the country, the venue was laid in *Middlesex*, and the declaration stated that the defendant, of A., in the county of B., came before C., then and there being a commissioner, &c. for B., and then and there before such commissioner became bail: Held, that this was a sufficient averment that bail was taken in B., so as to give C. authority to take it; that such averment being made without a venue, yet the county in the margin would help; and that the action might be well brought in *Middlesex*, where the recognizance was filed.

DEBT on recognizance of bail taken before a commissioner for the county palatine of *Durham*. The entry of the recognizance was drawn up, "*Middlesex*, *to wit, The sheriff of the county of *Durham*," &c. The venue *172] was laid in *Middlesex*, and the declaration stated, that the defendant, by the name of *John Hodgson* of *South Shields*, in the county of *Durham*, came before *G. Longstaff*, then and there being a commissioner duly appointed to take recognizance of bail, for the county palatine of *Durham*, and then and there before such commissioner became bail, &c.

Hullock, Serjt., on a former day moved in arrest of judgment; first, because it did not appear that the commissioner had any right to take the recognizance, and that his act was, therefore, a nullity; and, secondly, because there was no venue in the declaration. As to the first point, he urged that the statute 4 W. and M. c. 4, gives the court authority to appoint commissioners, and their commission gives them authority to take bail in their county only; and, therefore, the record ought to show jurisdiction, and that the oath was taken in *Durham*. All substituted authorities, and all which are the result of a qualified and particular authority, must be specially shown. Thus, if there were a warrant made by a justice of *Suffolk*, his authority in *Suffolk* must be specially shown, and that the act was done in *Suffolk*. As to the second point, he argued that the record is "*Middlesex*, to wit, *John Hodgson* came before *G. Longstaff*,"

which is a material fact, and that it was not averred when he came before *G. Longstaff*. He cited *Ware v. Boydell*, 3 M. & S. 148, *Dennison v. Richardson*, 14 East, 291, *Rex v. Hollond*, 5 T. R. 620, *Fabrigas v. Mostyn*, Cowp. 161, *Anger v. Brower*, 1 Vent. 350, *Hubbard's case*, Cro. Eliz. 78, *Leake's case*, Cro. Eliz. 98. (*Dallas, J.*, referred *to *Ilderton v. Ilderton*, 2 H. Bl. 145, *Sutton v. Fenn*, 2 Bl. 847. 3 Wils. 339, *Tidd's Pr.* 18. [*173 *Park, J.*, referred to *Miller v. Barber*, 3 T. R. 387, and *Howes v. Hazlewood*, Barnes, 483, there cited by *Grose, J.*) Rule nisi on the first point only.

Blosset, Serjt., now showed cause and contended, that the record was sufficient, because, as it was impossible for the defendant to plead that his own recognizance was taken out of the county, it was unnecessary for the plaintiff to show it was taken in the county.

Hullock, Serjt., in support of his rule. The question is not whether the defendant could have pleaded any thing; but whether a good cause of action appears on the declaration. If the recognizance were void, the due transmission of it will not cure it. Every precedent states, that the individual came at *A.*, in the county of *B.*, before *C. D.*, then and there being a commissioner, duly authorised to take bail in and for the said county. This is like a proceeding before a magistrate, which must always aver that he was a magistrate, authorised to act in and for the said county. So, if any process go to a sheriff, under which he justifies, it must be shown that the act was done in his bailiwick. There is no case in which these allegations are not to be found. It is not contended, that a commission might not have issued to a commissioner to take bail in all the counties in *England*, but the declaration does not show that, but only that he is a commissioner, to take bail in and for the county of *Durham*. The word "there" in the declaration, wherever it appears, must be referred to the county in the margin. It is argued, that "there" *means *South Shields*. By the same rule, the addition in the recital of a writ, would be equally referred to by the word "there." In *Sutton v. Fenn*, the declaration ran, "*Norfolk*, to wit, *W. F.*, late of *M. Wilts*," was attacked, &c. whereas the said *W. F.* at *Catton*, in the county aforesaid," &c. On general demurrer, the court held that the "county of *Wilts*," being in the recital of the writ, made no part of the declaration, and that "aforesaid," referred to the county in the margin. Unless this recognizance appear on the record to have been taken in the county, for which the commissioner is appointed, there is no cause of action.

DALLAS, J. It is clear, that it must appear, that the party, before whom the bail were taken, was legally authorised to take them. It is a sufficient averment of that, that *G. Longstaff* was appointed a commissioner to take bail, in and for the county of *Durham*. The only question is, whether it appears that the authority was duly pursued. It is not necessary to consider, whether "*J. Hodgson of South Shields* came before," &c. would be a sufficient averment of bail taken in the county, by reference to his place of residence, for it is afterwards stated, "*G. Longstaff*, being a commissioner, &c. in and for the county of *Durham*," and "that the party then and there became bail." It strikes me, that it must appear, that the party did come before him in that county; and, therefore, this motion in arrest of judgment cannot prevail.

PARK, J. It has been urged, with considerable force, that "there," must refer to the county in the margin; but "there," must be referred to the county in which the transaction ought to take place. I do not build on the reference to the place named in the description of the bail; but it is averred, that he came before *G. L.*, *being a commissioner to take bail in and for the said county of *Durham*; and I have the form of the commission, which [*175 is to take bail in the county of *Durham*. There, it expressly appears, that he was a commissioner, appointed to take bail within and for the county of *Durham*, and no where else; and that the bail came before the said *G. L.*, so being such commissioner as aforesaid. What is that but a commission to take

bail in and for the county of *Durham*; and where, then, can the bail legally be taken, but in the county? It seems to me, therefore, that this authority has been properly executed in *Durham*, though it might have been more fully averred. The action is brought properly in *Middlesex*, because the record is duly transmitted to *Middlesex*.

BURROUGH, J. This is a mere question of grammatical construction. "There" cannot, without the greatest violence, be referred to any thing but the words, "in and for the county of *Durham*." The declaration might have been more formal, if it had stated that the recognizance was taken in the county of *Durham*, but it is sufficient. The cases cited by my brother *Hullock* are good law, but they do not apply.

Rule discharged.

*176] *WARNER, et al., Assignees of PELLOWE, a Bankrupt, v. BARBER

[2 Moore 71 S. C.]

A prior commission of bankrupt, which has never been acted upon or superseded, not being in legal operation, does not invalidate a subsequent commission. Where such prior commission was produced for the purpose of proving notice of an act of bankruptcy: Held, that it was not necessary to show that nothing had been done under it; it is for the party raising the objection to prove the prior commission to be in legal operation.

THIS was an action of trover, tried before *Gibbs, C. J.*, at *Guildhall*, at the sittings after *Hilary* term, 1816. The commission, under which the plaintiffs claimed, was issued on the 4th of *April*, 1815, and the plaintiffs, anticipating that the defendant would seek to protect himself under the 49 G. 3. c. 121. s. 2.† gave in evidence a joint commission against *Pellowe & Foy*, dated the 16th of *September*, 1814. It did not appear that the joint commission had been opened or superseded. The defendant's counsel contended, that the action could not be maintained, as the bankrupt's property had been all taken from him under the prior commission. *Gibbs, C. J.*, held, that in the absence of proof to that effect, it could not be inferred that the first commission was subsisting and in force from the mere production of it. But he reserved the point for the opinion of *177] the court, whether the first commission, not having been acted *upon, or superseded, rendered void the second commission, under which the plaintiffs claimed. The jury found a verdict for the plaintiffs.

Lens, Serjt., in *Easter* term, 1816, obtained a rule *nisi* for setting aside the verdict and entering a nonsuit.

Vaughan and *Boanquet, Serjts.*, now showed cause, and stated, that the question was, whether the bare suing out of a commission under which no proceedings had been taken, should defeat the title of assignees under a subsequent commission. If a commission were to remain unopened for six months, the Lord Chancellor would not permit it to be afterwards acted upon. Nothing had

† Which enacts, "That in all cases of commissions of bankrupt hereafter to be issued, all executions and attachments against the lands and tenements or goods and chattels of the bankrupt, *bona fide* executed, or levied more than two calendar months before the date and issuing of such commission, shall be valid and effectual, notwithstanding any prior act of bankruptcy committed by such bankrupt, in like manner as if no such prior act of bankruptcy had been committed; provided the person at whose suit such execution or attachment shall have issued, had not, at the time of executing or levying the same, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment: provided always, that the issuing of a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed such notice, if it should appear that an act of bankruptcy had been actually committed at the time of issuing such commission.

been done under the first commission to disturb the property. A commission is merely an authority to certain persons to adjudicate and find whether the party be a bankrupt or not. The adjudication that he is a bankrupt is a necessary preliminary step to any dealing of the commissioners with this property, and did not take place here. An extent of the crown, though tested subsequently to the issuing of the commission, takes precedence, unless assignment had been previously executed; for, until the assignment, the property is not disturbed. In *Ex parte Bullen*, 1 Ro. By. Ca. 134, on a petition of the assignees of a bankrupt, against whom a former commission had issued, it was held, that the first commission can only be set up against the second, when it is in legal operation. In *Ex parte Mason*,† the Lord Chancellor said, “that although, strictly speaking, a second commission, where a first commission had issued and was in prosecution against the same person, was void at law; yet, that it had been the daily practise of the Court of *Chancery long before he came [*178 into it, if it could be done with justice to creditors and purchasers, and those who had been concerned with the first commission, to give effect to the second by arrangement there; and the difficulty in that case had arisen more from the circumstance of so much having been done under the first commission than from its validity at law.” In this case, therefore, the title of the assignees under the present commission cannot be effected, the prior commission never having been acted upon, and the property of the bankrupt not having been disturbed. If there be any case in which it has been said in general terms, that a first commission renders a second commission void, it must be explained by the language of the Lord Chancellor in all these cases, viz. that the first commission has that effect only when in legal operation.

Lens and *Best*, Serjts., in support of the rule. The plaintiffs have produced this difficulty in their case, and are themselves bound to clear it away. It was for the plaintiffs, who produced the first commission, to show by evidence that it had never been acted upon. They ought to have been aware of the effect of it, and not now to attempt to throw it on the defendants to show that it has been acted upon. If they introduce this, they ought so to introduce it as to show that it does not destroy their own title. When another commission, which has had, *prima facie*, just as good an origin as their own, is produced, it might easily be shown that the commissioners declared *Pellowe* no bankrupt, and, therefore, the commission stopped. Here the question is, whether they, having shown that there was another authority prior to their own, must not show how that authority is since vacated. It is assumed, on the other side, that lapse of time alone puts an end to a commission, that the Lord Chancellor would not suffer it to be *dealt with; yet, admitting that he would not, application should [*179 be made to him to ascertain whether he will supersede it. Perhaps he will, as a matter of course; but until he does, it subsists. Lapse of time of itself merely furnishes a ground for an order from the Lord Chancellor for superseding the commission. Admitting that nothing has been done under the first commission, yet there can be no second commission taken out; for, although the property is not disturbed if nothing is done under the commission, yet it is not necessary for the defendant that the property should be disturbed; it is enough for him if the pre-existing authority can, at any time, be called into use and disturb it. It is repugnant that an authority can be given to one set of commissioners to take order for the disposition of the bankrupt's property, while another set of commissioners are authorised to do the same thing. The two authorities, being co-extensive, are inconsistent, and cannot exist without an anomaly in the law. In every one of the cases cited on the other side, the Lord Chancellor begins by saying the second commission sued out is void; but, in all those cases, he proceeds to supersede the first commission. In *Ex parte Mason*, Ro. By. Ca. 423, the Lord Chancellor says, “Although, strictly speak-

† 1 Ro. By. Ca. 423. S. C. 1 Ves. & Bea. 160.

ing, a second commission, where a first commission is carried into prosecution, is void at law; yet it has long been the practice to make arrangement by superseding the first commission." A *supersedeas*, therefore, is necessary; and it is a case for the Lord Chancellor to decide. In *Ex parte Patchelor*, 2 Ro. By. Ca. 26, where a separate commission issued against one partner on the 14th of April, and a joint one against both partners on the 30th, the Lord Chancellor *180] said, "The existence of a prior *separate commission makes the second joint commission a nullity; but, for convenience, this court will supersede the separate prior commission." This, therefore, shows, that, although the Lord Chancellor may treat the prior commission as a nullity, the party cannot himself make it a nullity, which, of itself, it is not. In no book is it said that the first commission is void. Many judgments solemnly say the second is void. It is repugnant to law and common sense to say a second commission can issue, until the first is destroyed by the power whence it emanated.

DALLAS, J. This action is brought by assignees under the second commission, and there is no proof of any thing having been done under the first; and the right of these assignees is clearly established, unless defeated by the first commission. The first commission was given in evidence for a collateral purpose. It was objected, that it destroyed the plaintiffs' right to recover. The Chief Justice thought that as there was no proof of any thing having been done under the first commission, the action was properly brought. It is admitted at the bar, that if the first commission had been acted on, the second would be void; and it would be necessary to apply to the Lord Chancellor to supersede the first. But the question is, whether it is necessary to apply to the Lord Chancellor to supersede in a case where the first commission has not been acted on. The counsel for the defendant go farther; they say that the *onus* is on the party producing the commission, to show that it was not in force. But since it was produced for the purpose of showing a date only, I think it was incumbent on those who would set up the first commission to show it had been acted upon; and that, otherwise, there is no need of superseding *it. The *181] Lord Chancellor, in *Ex parte Bullen*, 1 Ro. By. Ca., says, "A second commission, while a first is existing, is, strictly speaking, void; but such commission can only be set up against a subsequent one, when it is in legal operation." Under the circumstances, I think the Lord Chief Justice was right, and that this rule must be discharged.

PARK, J. In *Ex parte Bullen*, Lord Eldon supposes that two commissions may co-exist. And in *Ex parte Mason*, 1 Ves. & Bea. 160, he goes through the whole history, from Lord Hardwicke's time, and says, Lord Hardwicke contrived to sustain joint and separate commissions, co-existing at one and the same time. How, if the prior commissions were void, could they all be thus co-existing? It appears to me, that this prior commission cannot be set up until it is acted upon.

BURROUGH, J. The property remained in the bankrupt, after issuing this first commission, as much as before; there is no reason, therefore, why that commission should prevent the operation of the second. It is a new authority, and nothing else. The second is an equal authority, emanating from the same source, with the same powers. It is the duty of the Lord Chancellor to inquire whether the first commission was in operation or not; and are we to presume, when he issues the second, that he did not satisfy himself that the first was not in operation? A jury ought to have been directed to presume the first was not acted on; for, otherwise, the chancellor would not have granted a second. I, *182] therefore think that the Lord Chief Justice has acted rightly, and that the rule must be discharged.

Rule discharged.

HILL et ux. v. YATES et al.

[2 Moore 80. S. C.]

In actions of trespass and false imprisonment the question of reasonable and probable cause for the apprehension of the plaintiff cannot be left to the jury.

TRESPASS for assault and false imprisonment. The defendants pleaded the general issue, and also justified, under the 15 *Car. 2. c. 2. s. 2.* The cause was tried before *Garrow*, B., at the last assizes at *Shrewsbury*, when it appeared, that the defendants, one of whom was a constable, met the woman at night, near a hedge, with a candle and lanthorn; they took her to a public house, and the next day took her before a magistrate; when *Yates* said it was her second or third offence, she did not deny it. There was no evidence at all that the hedge had been broken, or that the woman had stolen wood. *Garrow*, B., told the jury, that, if the defendants had shown that they had any reasonable or probable cause, they were entitled to a verdict. The jury found a verdict for the defendants.

Copley, Serjt., had obtained a rule *nisi* to have this verdict set aside, and a new trial granted, on the ground that the question of reasonable and probable cause should not have been left to the jury; as that was matter of law.

Lens, Serjt., now showed cause. The 15 *Car. 2. c. 2.*, gives authority to imprison on suspicion. Reasonable *and probable cause, strictly speaking, does not refer to trespass; but the question is, whether the defendants had reasonable suspicion: and the judge left the question of suspicion to the jury. [*Burrough*, J. What the judge left to the jury was, not whether they suspected, but whether they had reasonable and probable cause, which ought never to be left to the jury.] [*183

DALLAS, J. Reasonable and probable cause being matter of law, was matter on which the learned judge might have decided; but it ought not to have been left to the jury, and they ought not to have been asked whether they thought there was reasonable and probable cause. I think there must be a new trial, in order that the judge may distinctly say, whether he holds that there is ground for reasonable and probable cause, and pronounce his direction thereon.

PARK, J., and *BURROUGH*, J., concurred.

Rule absolute.

BENETT v. COSTAR.

[2 Moore 83. S. C.]

1. A common of fishery is not correctly described by alleging it to be a common fishery.
2. Proof of the owner's right to fish opposite his own land, *ad medium filum aquæ*, cannot be given under a plea of a common of fishery.
3. Where, in an action of trespass to a fishery, the jury find the defendant justified on one issue, and state the right under which they found him justified, such a finding may be treated as a special verdict.

TRESPASS. For breaking and entering plaintiff's close, covered with water, and carrying away his fish there found. Pleas, that the close was the close *of one *W. A.*, and that defendant fished as his servant. The plaintiff in his replication newly assigned by setting out the abutments of plaintiff's close covered with water, and specifying the exact spot of defendant's trespass. [*184

The defendant pleaded thereto, that the *locus* newly assigned, was the close of *W. A.*, and that defendant fished there as his servant; next, that the close was the soil and freehold of *W. A.*, and that defendant entered as his servant; and that *W. A.*, and all those whose estate he had, had and still ought to have a *common fishery* in the said part of the close, in which, &c.; and had been accustomed to take and carry away, and still of right ought to catch and carry away, by himself and his servants, fish from time to time, found in the said fishery, every year, at all times of the year, at pleasure, as belonging and appertaining to the said land, with the appurtenances; for which reason, the defendant, as the servant of *W. A.*, and by his command, broke and entered the same close, in the same part thereof, in which, &c., and fished therein for fish, in the *common fishery* of *W. A.*, and the fish there found, took and carried away, as being the fish of the said *common fishery*, as he lawfully might. Replication to the first plea to new assignment, traversing that the *locus* newly assigned is the close of *W. A.* Issue thereon. To the second plea to new assignment, traversing *W. A.*'s alleged *common fishery* over the *locus* newly assigned. Issue thereon.

At the trial before *Burrough, J.*, at the *Wiltshire* summer assizes, 1817, the plaintiff, who was lord of the manor of *Enford*, gave in evidence several ancient grants to his ancestors, relating to that manor, in which the *locus in quo* was situate. These grants extended over a period from 13 *Edw. I.* to 12 *Jac. I.*, and comprised, among other things, a grant of free warren of all wastes, waters,

*185] fishings, fisheries, and royalties of fishing, within the manor of *Enford*: he also gave in evidence two presentments of the jury of the manor court, signed by the defendant as juryman, stating the exclusive right of the lord of the manor to the fishery within the said manor. The plaintiff's witnesses, on cross-examination, stated that the persons under whom the defendant claimed were owners of the land on one side of the river, and that they and their servants had been always in the habit of fishing in all parts of the river, and not merely on the half of it nearest their own land; and though at times forbidden by the plaintiff's servants, they had never desisted on that account. *Burrough, J.*, told the jury that the question was, whether the plaintiff had made out his claim to an exclusive right to fish? that the grants were of little weight without usage; that, in the right of fishing set up by the defendant, by the phrase of a common fishery, might be intended to mean a common of fishery: it did not appear that any one else had fished on the same spot, so as to make out that right, though he had by fishing across the stream, fished beyond the *filum aquæ*, the boundary to which his property in the land entitled him to fish. The jury found a verdict for the defendant on the common of fishery; and for the plaintiff, on the other issues; and stated as the ground of their verdict, that the defendant had a right to fish opposite his own land.

Copley, Serjt., had, on a former day, obtained a rule *nisi* to enter judgment for the plaintiff, notwithstanding the finding for the defendant on the last plea to the new assignment, or to enter a verdict for the plaintiff on that issue, or for a new trial, on the ground as to the first alternative, that the plea having claimed a common fishery instead of a common of fishery was bad, and that the plaintiff was therefore entitled to judgment on the whole record; as to the *186] second, that this verdict was, in effect, a special verdict, and, therefore, might be entered for the party entitled upon the facts found; and, as to the third, that the verdict on this issue was contrary to the evidence, and ought to have been for the plaintiff, which entitled him to a new trial.

Pell, Serjt., now showed cause, and contended as to the first point, that the plea was not bad, because a common fishery was a common of fishery; and he cited *Vin. Ab. Piscary*, C, which commences thus, "*Piscary* is threefold, *separalis, libera, et communis*;" also *Smith v. Kemp*† in all of which, com-

† *Salk.* 637. *S. C.* 4 *Mod.* 187. *Skin.* 342.

munis piscaria is the expression used for common of fishery. He also referred to some precedents in the collection of Gibbs, C. J.; one signed by Serjt. Burland, in which a party prescribes for a common fishery. As to the second point, that the foreman of the jury had no right to bind the rights of the parties, in the manner he had done, by the special verdict on the notes; and as to the third point, that the whole weight of the evidence, with the exception of the written documents, was in favor of the defendant.

BURROUGH, J. As to the first point, the old entries, *Liber Intrationum, Rastall, &c.*, have *communiam piscariæ*. A common fishery may mean for all mankind, as, in the sea, a general right which cannot be traversed. But, as in this case, no man can doubt what was meant to be said, I think there should be leave to amend. As to the second and third points, if the jury found their verdict on the ground that was stated, viz. that the defendant had a right to fish opposite his own land, the verdict ought to be for the plaintiff; for this user would not support a common of fishery, but a right of a wholly different sort, which was not stated on this record: but, as the jury [187 have not distinguished between these two rights, there should be a new trial.

DALLAS, J. As to the first point, a common of fishery is a right in common with certain other persons in a particular stream. Though text-writers have used the terms *communem piscariam* and *communiam piscariæ* indifferently, a common fishery extends to all mankind. The defendant should have leave to amend, by introducing the word *of*. As to the second and third points, there is no doubt that the verdict would stand good as a special verdict, if all the jury were agreed; but as it is a question whether all were agreed, I think there should be a new trial, with leave to amend by inserting the word "*of*" without costs.

PARK, J., concurred.

Rule for a new trial made absolute accordingly.

GENT et al. v. ABBOTT and MAITLAND.

[2 Moore 87. S. C.]

A *capias quare clausum fregit* issued against A. and B., with an *ac etiam* in debt, upon which A. was arrested. A special original in debt, a *capias*, *alias*, and *pluries*, and writs of *exigent* issued against both; there was a *supersedeas* as to A., and a *exigent* returned, that B. was outlawed on the 23d of October; and on the 26th of November, a declaration in debt was delivered against A., entitled of *Trinity* term, averring the outlawry of B.: Held, that the delivery of the declaration was regular, but that, as it was entitled previously to the outlawry, it was wrong. The court, however, allowed it to be amended on payment of costs.

BOSANQUET, Serjt., had obtained a rule *nisi*, that the proceedings in this action should be set aside for irregularity.

*Best, Serjt., on a subsequent day, showed cause, and the court [188 having referred to the secondary,

DALLAS, J., now delivered judgment.† A writ of *capias quare clausum fregit* was issued by the plaintiffs against both the defendants, directed to the sheriff of *Middlesex*, with an *ac etiam* in debt, returnable on the morrow of the *Holy Trinity*. Upon this writ the defendant Abbott was arrested, and justified bail. A special original in debt was issued against both the defendants; a special *capias* against both, returnable in five weeks of *Easter*; an *alias* against

† The facts of this case, and the objections which were made, are so fully disclosed in the judgment of the court, that it has been considered unnecessary to state them.

both, returnable on the morrow of the *Holy Trinity*; a *pluries* against both, returnable in three weeks of the *Holy Trinity*; and writs of *exigent* were issued against both, returnable on the morrow of *All Souls*. There was a *supersedeas* as to *Abbott*, and an *exigent* returned, that *Maitland* on the 23d of *October*, &c., was demanded, did not appear, and was thereupon outlawed; and on the 26th of *November* last, a declaration in debt on the original, entitled of *Trinity* term, against *Abbott* only, containing an averment, that *Maitland* had been outlawed in this suit, was delivered.

To these proceedings it has been objected; first, that the declaration was irregular, as not being founded on the process on which *Abbott* was arrested; secondly, that there is no connection between the original and the process on which he was arrested; and, thirdly, that the declaration should have been entitled of *Michaelmas* term and not of *Trinity* term, which was previous to the outlawry of *Maitland*. Upon reference to the prothonotaries and the other officers, they agree that this outlawry has been according to the regular *189] practice of the *court. An outlawry cannot take place on process with an *ac etiam*; and the writs on which this outlawry is grounded, being originals, contain no clause of *ac etiam*. That clause was introduced by rule of court, to prevent the repetition of the special cause of action in a common writ. The declaration is founded on the original on which *Maitland* was outlawed. The writ with the *ac etiam* on which *Abbott* was arrested, and put in bail, was issued only to bring him into court. *Abbott* being brought into court, the purpose of the writ is answered; and when in court, a defendant may be declared against in any cause of action. The effect of the plaintiff's declaring, in a cause of action, differing from the process, would be the discharge of the bail, but would be no ground for setting aside the declaration, as has been contended in this case.

As to the third objection, the declaration ought to have been entitled of *Michaelmas* term, and is wrong as it now stands.

Under the circumstances, the court allowed it to be amended on payment of costs.†

† See *past*. 304.

*190] *The Corporation of ARUNDEL v. BOWMAN.

[2 Moore 91. S. C.]

Breach of covenant assigned that the defendant, to wit, on, &c., and on divers, to wit, nineteen other days between that day, &c., did, &c.,—Plea, that the defendant did *not* on the several days in the declaration mentioned, &c. Special demurrer: Held, that the plea was bad, as it took an immaterial traverse, and tied the plaintiff down to prove breaches on all the particular days mentioned in the declaration.

THIS was an action of covenant; the breach assigned was, that the defendant, during the demise, to wit, on, &c., and on divers, to wit, nineteen other days between that day, &c., depastured part of the demised premises with other cattle than sheep. To this breach the defendant pleaded, that he did not, on the several days in the declaration mentioned, depasture, &c. Special demurrer, and joinder.

DALLAS, J. The time is laid under a *videlicet*, and the plaintiff is not bound to prove the particular days; then, what has the defendant traversed;—that he

depastured the premises on those days, not that he depastured them *modo et forma*, thus taking an immaterial traverse, and tying the plaintiff down to days and times, as material in the plea, which were immaterial in the declaration.

The court, however, gave the defendant leave to amend on payment of costs.

Best, Serjt., argued for the defendant.

*BAXTER, Demandant; BAXTER, Tenant; HAWKINS and BROWNE, Vouchees. [*191

Recovery amended by deed to lead the uses, by inserting the name of the parish of *A.*, where the recovery was of lands in the parishes of *B.* and *C.* or any adjoining town, *A.* being contiguous to *B.* and *C.*

LENS, Serjt., moved to amend this recovery, by the deed to lead the uses, by inserting the parish of *Chifnall*, on the affidavit of *Browne*, that he was seised of an estate of freehold of lands in the parish of *Chifnall*, in the county of *Salop*, which appeared by the deed to lead the uses of this recovery to have been intended to pass by a recovery, suffered of all his lands in the parishes of *Great Dawley* and *Lillishall* or any adjoining town, and that *Chifnall* adjoined *Great Dawley* and *Lillishall*.

Fiat.

REMNANT v. BREMRIDGE.

[2 Moore 94. S. C.]

A. as administrator of *B.*, the lessee of certain premises, took possession of them on *B.*'s death, but paid no rent. The premises proved to be unproductive, and, after eight months, *A.* made the lessor a verbal offer to surrender them. In an action brought against *A.*, in his own right, for rent due after the decease of *B.*: Held, that *A.* was not chargeable.

ASSUMPSIT for the use and occupation of land and premises by the defendant. Plea, general issue.

At the trial before *Gibbs*, C. J., at the *Middlesex* sittings, in last *Trinity* term, it appeared, that, by an agreement dated the 16th of *March*, 1807, the then owners of the premises agreed to grant a lease of them to *John Bremridge*, since deceased, for sixty-eight years and three-quarters. *John Bremridge* died in possession of the premises *in *November*, 1814, at which time the plaintiff had become entitled to the reversion. The defendant [*192 administered to *John Bremridge*, and on the 6th of *February*, 1815, paid to the plaintiff one year and a half's rent due on the 25th of *December*, 1814, which was after the intestate's death. On the 30th of *December*, 1814, the defendant sold forty thousand bricks from off the premises, and caused a board to be put up, and to remain on the premises for several months, denoting, that the ground was to be let or sold, and referring for information to the defendant's agent. No offer was made by the defendant to give up the premises to the

plaintiff until eight months after the intestate's decease, and then, only a verbal offer was made. The estate was insolvent, and the defendant had received no profits from the premises.

The jury found a verdict for the plaintiff, subject to the opinion of the court, whether there was sufficient evidence to maintain the action; and whether the verbal offer to give up the premises was sufficient in law? If the court should be of opinion against the plaintiff, a nonsuit to be entered.

Lens, Serjt., in last *Trinity* term, had, accordingly, obtained a rule *nisi* for setting aside the verdict, and entering a nonsuit; and, in *Michaelmas* term.

Best, Serjt., showed cause. He observed, that the whole question was, whether an administrator could, after eight months' occupation, renounce the lease. The defendant merely says that the estate is insolvent, and that, therefore, he shall give up the term. On this short ground the plaintiff is entitled to judgment, for a lease cannot be put an end to in that manner. Besides, the defendant, as an administrator, cannot refuse this term, for it is stated in *Comyns'*

*193] *Digest*, Administration, B. 10, "if the testator had a term for years, this vests in the executor or administrator, and he cannot refuse it, though it is worth nothing." In *Bolton v. Canham*, Pollexfen, 123, every case, from the year-books downwards, is cited and commented on, and the liability of an executor for rent is fully discussed. *Pollexfen* says, "the executorship is entire, and he cannot divide it; he must take all or leave all." He considers the case both on principle and authority, and it runs with this. Here the administrator takes to the premises, pays rent for a time, and, at length says, he will keep them no longer. He cannot do this; he must take all or none. In *Billinghurst v. Spearman*, 1 Salk. 297, *Holt*, C. J., says, "an executor cannot waive for the term only, he must renounce the executorship *in toto*, or not at all." *Lyddall v. Dunlapp*, 1 Wils. 4, is not an authority against the plaintiff: that case was never decided. There is an *ulterius concilium* at the end of it, and the defendants were sued as executors. The defendant has not that election which the assignees of a bankrupt, for reasons peculiar to the bankrupt laws, have; he cannot split his office; he cannot take time to choose; he must instantly elect to take, or reject the intestate's estate altogether.

Lens, Serjt., in support of the rule, admitted that an executor must either renounce the executorship or accept the term with it, but urged, that the question here was, whether he is bound to pay rent for this term; whatever interest the deceased had is undoubtedly cast upon the defendant; but it was a mistake to say, that he had paid rent for part of the time and then refused. The defendant paid rent up to the time of the decease of the intestate and no more; and, there-

*194] fore, that circumstance does not exist on which the plaintiff has relied so much, viz., that there had been a payment of rent by the defendant, which had become due since the intestate's decease. *Billinghurst v. Spearman*, goes far to show, that an executor is liable no further than he has assets. [*Burrough*, J. This action is not brought to charge the defendant as executor.] It is admitted, that if any one, not administrator or executor, were charged as assignee, he would be liable; and, though the defendant is here charged as assignee, and not as administrator, yet he shall not be in a worse situation because the plaintiff has sued him in a wrong character. [*Burrough*, J. Then, ought not that to have been pleaded specially?] As the defendant is not sued as administrator, it is open to him to show, under the general issue, that he is only chargeable as executor or administrator, and that he has no assets to render him liable as such. In *Billinghurst v. Spearman*, it was held, that a defendant, sued as executor, might plead no assets, and that the premises were of less value than the rent. This the defendant would have pleaded if he had been properly sued as administrator; but as he is sued wrongfully, he can show it in evidence under the general issue. If land, which an executor holds as executor, be not worth the rent beyond the assets, he is not liable to the

rent; and an insolvent estate, which yields nothing, is not to charge him with the rent. In *Buckley v. Pirk*, 1 Salk. 316, *Parker, C. J.*, held, that if the executor of a lessee enters, the lessor may charge him as assignee for the rent incurred after his entry; and that, if the rent be of less value than the lands, as the law *prima facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to any thing else; and, therefore, in such case, *the defendant cannot plead *plene administravit*, for that confesses a misapplication, since no other payment out [195 of the profits can be justified till the rent be answered. In this case, there were no profits; the premises were mere vacant ground. All the cases cited by Mr. Serjeant *Williams*, in his note to the case of *Jevens v. Harridge*, 1 Saund. 1. n. 1, go on the distinction which there is between assignee and executor. They show, that if the profits of the land do not amount to the value, the defendant is not bound to pay more than the profits. If there are no profits, he need pay nothing; he is not to be absolved from his relation of tenant, but from his payment of rent; and if the lessor chooses to charge him as assignee generally, he is at liberty to show what sort of assignee he is. As to the offer to give up the term, there is no law which requires that it should be in writing.

The court expressed a wish to consult the chief justice, who had tried the cause.

Cur. adv. vult.

DALLAS, J., now delivered the judgment of the court. This was an action for use and occupation, and the defendant can only be liable as the personal representative of his brother, who died intestate. The plaintiff sued the defendant generally, and did not describe him as an administrator in the declaration. He must, therefore, be considered to have made his election, and charged the defendant as an assignee. Some evidence was given at the trial, that the defendant had taken possession of the premises after the death of the intestate, and that, eight months after the death, he offered by parol to give up possession of the premises, or surrender the interest to the plaintiff; but that the plaintiff *had taken no notice of such offer, as it was not made in writing. It [196 is quite clear, that the plaintiff, not having sued the defendant as an administrator, could not recover from him in that capacity; and it is equally clear, that, if the defendant were not in possession, he could not be liable to discharge the rent *de bonis propriis*. For, in the first place, he might have pleaded that the premises were of less value than the rent; and, secondly, that he had no assets. It is unnecessary to determine, whether it was requisite for him to plead the latter, as it was not proved that the defendant had such assets. The only question then is, whether he can be considered as having taken possession of the premises or not? The note of Mr. Serjeant *Williams* goes to show, that, if the defendant had failed in proving that the premises had been productive of no profit, he might then have shown that he had no assets; and that, if the premises were of less value than the rent, he was not bound to plead it specially, but might have the benefit equally by giving it in evidence. It was clearly proved at the trial, that he had derived no benefit from the premises in question. The court at first doubted whether, as it appeared he had taken possession, it was necessary that he should surrender the premises to the plaintiff by an instrument in writing; but we are now of opinion, that the offer to give up the possession by parol was sufficient, and consequently, that a surrender in writing was unnecessary, and that the rule, therefore, must be made absolute.

Rule absolute accordingly.

*BRUIN, Demandant; BLIZARD, Tenant; MILLER, Vouchee.

Return-day of the writ in a recovery, returnable in the last term, amended, and the recovery allowed to pass, as of the present term.

In this recovery, *Frere*, Serjt., moved to amend the return-day of the writ, which was returnable on the morrow of *All Souls*, in last *Michaelmas* term. The parties were resident at *Cheltenham Spofforth*, near *Wheatherby*, the acknowledgment was taken on the 25th of *November*, and the papers were sent back on the 2d of *December*, too late for that term. It was prayed that the return might be altered, so that the recovery might pass as of this term.

Fiat.

BRAY v. FREEMAN.

[2 Moore 114. S. C.]

The declaration stated that *A.* was indebted to the plaintiff in a certain sum, to wit, 26*l.* 13*s.* 6*d.*, being the balance of a certain larger sum, that in consideration that the plaintiff would forbear to sue *A.*, the defendant undertook to accept the bill for the said balance of 26*l.* 13*s.* 6*d.* The actual balance due was only 26*l.*: Held, that although the sum in the statement of the contract was not laid under a *videlicet*, yet, as it referred to the inducement where the sum was laid under a *videlicet* and as the substance of the contract was to pay the *balance due*, there was no variance.

ASSUMPSIT. The first count stated, that *Samuel Freeman*, the father of the defendant, was indebted to the plaintiff in a certain sum, to wit, 26*l.* 13*s.* 6*d.*, being the balance, or residue remaining unpaid of a larger sum, to wit, 45*l.* 4*s.* *198] 6*d.*, before then *due from *Samuel Freeman* to the plaintiff, upon a bill of exchange, drawn by the plaintiff upon, and accepted by, *Samuel Freeman*, for payment at three months, to the order of the plaintiff, of the said sum of 45*l.* 4*s.* 6*d.*, and of which said sum of 45*l.* 4*s.* 6*d.*, part had before been paid and satisfied to the plaintiff, leaving such balance as aforesaid due to the plaintiff. That *Samuel Freeman* being so indebted to the plaintiff, and the said balance, or sum of 26*l.* 13*s.* 6*d.* remaining unpaid, the plaintiff was about to sue *Samuel Freeman* for the recovery of the said sum of 26*l.* 13*s.* 6*d.*, whereof the defendant had notice; that in consideration of the premises, and that the plaintiff, at the request of the defendant, would forbear to sue *Samuel Freeman* for the recovery of the said balance, or sum of 26*l.* 13*s.* 6*d.*, and would draw a bill of exchange on the defendant, to bear date the day and year last aforesaid, and to be made payable at six weeks after date, for the amount of the said balance, or sum of 26*l.* 13*s.* 6*d.*, the defendant undertook to accept such bill; that the plaintiff did forbear to sue *Samuel Freeman* for the recovery of the said balance of 26*l.* 13*s.* 6*d.*; that he drew the bill on the defendant, and presented the same to him for acceptance; yet that the defendant did not accept the bill, nor had he paid or satisfied the plaintiff the said balance of 26*l.* 13*s.* 6*d.*, so due from *Samuel Freeman* to the plaintiff.

The second count was on the bill of exchange, stating an acceptance by the defendant. There were also the common money counts. The defendant pleaded the general issue.

At the trial of the cause before *Burrough, J.*, at the *Middlesex* sittings, after last term, it appeared that the balance due from *Samuel Freeman*, to the plain-

tiff was only 26*l*. The plaintiff produced a note, written by the defendant, without date, in the following terms:

*"Mr. Bray,

"If you will draw a bill at six weeks' date for my fathers' balance, [*199 dating it to-day, due the 26th of next month, I will accept it.

S. W. Freeman."

The plaintiff accordingly drew a bill, and sent it to the defendant for his acceptance. On application, a few days afterwards, the defendant refused to return it. The jury found a verdict for the plaintiff for 26*l*., with liberty for the defendant to move to set it aside, and enter a nonsuit, on the ground that the plaintiff had not proved the contract as laid in the declaration.

Vaughan, Serjt., on a former day, having obtained a rule *nisi* to that effect.

Best, Serjt., now showed cause, and contended that the contract was properly stated in the first count. The inducement speaks of a certain sum, to wit, 26*l*. 13*s*. 6*d*. being the balance of a certain larger sum, and though the sum in the subsequent part of the count is stated without a *videlicet*, yet the subsequent part refers to the first part. What is laid under a *videlicet* need not be strictly proved, and the subsequent part referring to the prior part, the said balance of 26*l*. 13*s*. 6*d*. refers to the balance before mentioned, where the sum of 26*l*. 13*s*. 6*d*. was laid under a *videlicet*. The whole difficulty arises from the *videlicet* not being repeated in the subsequent part of the declaration.

Vaughan, Serjt., in support of the rule. The contract must be truly stated. *Bristow v. Wright*, 2 Dougl. 665, *King v. Pippet*, 1 T. R. 235. The court is not to look to the inducement but to the contract itself. It ought to have been averred, *that the bill was for the amount of the balance. In the contract the plaintiff has bound himself to a specific sum, and he ought [*200 to have proved it as laid.

DALLAS, J. There is no doubt that a contract must be proved truly, that is, in substance. If a party goes beyond the substance of a contract, and states it precisely, and, in that precision, it differs from the contract proved, it is a variance. The question is, what is the substance of this contract? It is, to accept a bill for the balance due from the defendant's father to the plaintiff. If the averment had been stated in the contract itself, as it is stated in the inducement, it clearly would not have bound the plaintiff to a precise sum; and here it is, in fact, laid under a *videlicet*, for it refers to the balance aforesaid, which is laid under a *videlicet*, and, therefore, there is no variance.

PARK, J., and BURROUGH, J., concurred.

Rule discharged



HOGG et al., Assignees of DIXON and HECKMANN, Bankrupts, v. BRIDGES, et al.

[2 Moore 122. S. C.]

A. and *B.* were partners. *A.* committed an act of bankruptcy, and afterwards, but before the bankruptcy of *B.*, the sheriff seized goods which had belonged to *A.* and *B.*, under an execution against them: Held, that the assignees of *A.* and *B.*, under a joint commission, could not, suing as such, recover *A.*'s share of the property therein.

ASSUMPSIT. The declaration contained the usual money counts, stating the promises to have been made to the bankrupts for money due to them before the bankruptcy, and also counts for money had and received and on an account, stating the promises to have been made to the plaintiffs as as- [*201

signees, for money due to them after the bankruptcy. The defendants pleaded the general issue.

The plaintiffs, as assignees under a joint commission of bankrupt issued against *Dixon & Heckmann*, who were in partnership, sought to recover against the defendants, the late sheriff of *Middlesex*, the sum of 1572*l.* 16*s.*, being the amount of a levy received by them under a writ of *fieri facias*, issued against the bankrupts, at the suit of Messrs. *Young & Co.*

At the trial before *Dallas, J.*, at the *London* sittings after the last term, it appeared that the levy was made on the 29th of *May*, 1817, and that the commission issued on the 6th of *June*, following. There was no question as to *Heckmann's* having committed an act of bankruptcy prior to the 29th of *May*, or of *Dixon's* having committed an act of bankruptcy afterwards: but *Dallas, J.*, left it to the jury to say whether *Dixon*, had committed an act of bankruptcy before that day; and they found a verdict for the defendants.

Lens, Serjt., had obtained a rule *nisi* to set aside the verdict, and enter a verdict for the plaintiffs for the sum of 786*l.* 8*s.*, being a moiety of the sum levied, on the ground of an act of bankruptcy having been proved to have been committed by *Heckmann*.

Best, Serjt., now showed cause, and contended, that as this was an action by the assignees of *Dixon & Heckmann*, and *Dixon* was not proved to have committed an act of bankruptcy before the cause of action accrued, the plaintiffs could not establish their title to recover as assignees of both, and

*202] he cited *Ray v. Davies*, Ante, 134, as being similar to the present case. *Lens, Serjt.*, in support of his rule, contended, that the act of bankruptcy of *Heckmann*, dissolved the partnership, and created a tenancy in common between the assignees and *Dixon*, and consequently that the plaintiffs were entitled to the moiety. *Fox v. Hanbury*, 2 Cowp. 445, *Smith v. Stokes*, 1 East, 363, *Smith v. Oriell*, 1 East, 368. That as assignees of both, the plaintiffs had a right to take the property of both, and also the property of each. [*Park, J.* If assignees, under a joint commission, declare for the separate property of one, they must declare as the assignees of that one, *Harvey v. Morgan*, 2 Stark. N. P. C. 17.

Per curiam. This action cannot be maintained, and the rule must therefore be discharged.

MAINWARING v. BRANDON, et al.

[2 Moore. 125. S. C.]

A. having a commission from B. to ship tobacco, employed C. as his broker, and directed him to buy *Porto Rico* tobacco of the best quality. C. bought tobacco and shipped it to B., and delivered his bought-note to A. in which the tobacco was described as *Porto Rico* tobacco only. B. finding the tobacco to be very bad, refused to accept it, and brought an action against A. and recovered: Held, that an action lay by A. against C., and that A.'s acceptance of the bought-note was not a waiver of his directions as to quality, and that the proper measure of damages was, not the mere difference in price between the two kinds of tobacco, but the amount of the damages and costs recovered in the action by B. against A.

ASSUMPSIT by the plaintiff, who had employed the defendants, as brokers, to buy tobacco, against them for negligence and unskilfulness in the purchase, *203] whereby the plaintiff, who had been commissioned by *Gevers & Co.*, to ship tobacco for them, had been subjected to an action at the suit of *Gevers & Co.*, on account of the bad quality of the tobacco, in which action they recovered.

At the trial before *Burrough, J.*, at the *London* sittings after the last term, it appeared, that the plaintiff having been commissioned to ship a quantity of tobacco to *Holland*, for *Gevers & Co.*, applied to the defendants, and gave them an order for a quantity of the best *Porto Rico* tobacco. The defendants shipped tobacco, and delivered to the plaintiff the following bought-note :

"Bought by order and for account of Messrs. *Mainwaring & Co.*, 130 bales of *Porto Rico* tobacco of Messrs. *Scott, Burn, & Co.*, at 19d. per lb., at landing weights, with customary allowances, payable by their acceptance at two months. *Brandon, & Sons.*"

When the tobacco arrived in *Holland*, *Gevers & Co.* refused to receive it, and brought an action against the plaintiff: the defendants were applied to, to furnish the plaintiff, on that occasion, with a defence to the action. It was proved, that the tobacco was of very bad quality; it was old, mouldy, and had the dry rot. For the defendants, it was objected, that the action ought to have been brought against *Scott, Burn, & Co.*; and also that, as the bought-note did not describe the tobacco as *best Porto Rico tobacco*, but only as *Porto Rico*, the plaintiff had notice of the quality, and had acquiesced. *Burrough, J.*, thought the action was well brought against the defendants; and that although the bought-note was not so full as the order, yet, that it was not inconsistent with it, and that the omission might be supplied by evidence. As to the measure of damages, he was of opinion, that the plaintiff was entitled to recover the damages and costs of the former action. The jury accordingly found a verdict for the plaintiff, for the amount of those costs and damages. [*204]

Copley, Serjt., had obtained a rule *nisi* for setting aside this verdict, and having a new trial; first, because this action would not lie against the defendants; secondly, because the receipt of the bought-note by the plaintiff was an acquiescence; and thirdly, if the plaintiff was entitled to recover, he was only entitled to the difference in price between good and bad tobacco.

Lens and Best, Serjts., now showed cause. The first question is whether the plaintiff may sustain an action against *Brandon & Co.*, or must sue *Scott, Burn, & Co.*; but the defendants have not furnished the plaintiffs with any cause of action at all against *Scott, Burn, & Co.*, and they are not in fault as to any one. [*Dallas, J.* What privity of contract is there between the plaintiff and *Scott, Burn, & Co.*?] It is not contended, that a broker is to be an insurer of the quality of what he buys, but that he must have competent skill, and exercise it. Here the defendants either had no skill, or if they had, they did not exercise it; for it was in evidence, that the tobacco was so bad that even a common laborer in the warehouse saw the defect, and if any one had bent a roll, the rottenness of the inside would have been instantly discovered. As to the bought-note, that is not the contract between these parties; it only states what the contract was between the defendants and *Scott, Burn, & Co.*; and there is no pretence for saying, that the plaintiff having given orders in the most express terms to buy the best *Porto Rico* tobacco, is to be taken to have waived all directions as to the quality, because the defendants show him that they have purchased *Porto Rico* tobacco. The defendants admitted, [*205] over and over again, that the order was to buy the best, and they insisted that they had bought the best; they never put it, as they do now, that they were justified in buying inferior tobacco. It is completely made out, that the defendants have disobeyed their orders. As to the remaining question, the defendants want to throw the tobacco on the plaintiffs' hands, and to pay only the difference in price; but they are not entitled to do so. They have not bought the article which the plaintiff ordered; it has not been accepted; therefore, it is still theirs; it has always been open to them to take it; and no order from the plaintiff is necessary for that purpose, but if it is, the plaintiff is willing to give it. At all events, the plaintiff is not bound to take the tobacco, for it never was his; he

was merely the correspondent and agent of *Grevers & Co.*, and it is not the property of *Gevers & Co.*, for it is not what they ordered.

Copley, Serjt., in support of the rule. It has been said, that there is no contract between the plaintiff and *Scott, Burn, & Co.*; but that is not the case, for the goods were not bought by the plaintiff of the defendants, but of *Scott, Burn, & Co.* The contract is between the plaintiff and *Scott, Burn, & Co.*, and is for *Porto Rico* tobacco : that imports nothing more than *Porto Rico* tobacco of merchantable quality : the plaintiff accepted that contract, and must be bound by his own acceptance, thus waiving his former order, not by the act of *Brandon & Co.*, but by his own act. Had the plaintiff objected at the time, the goods would never have been delivered; the defendants would have gone back and rectified the error; but now, they have a right to say, that the plaintiff has waived his former instructions, and must be taken to have adopted this new
 *206] contract, and to have received the goods upon it. It is not pretended, that these goods disagree with the contract with *Scott, Burn, & Co.*, and if they are not liable to an action *a fortiori*, the defendants, as brokers, cannot be. It would be an extreme hardship if a broker were liable, even if the article did not agree with the contract; even in that case, the action must be brought against the vendor, and not against the broker. If the principal can pay, the plaintiff receives no injury : if he cannot, then the plaintiff may sue the broker. The broker can maintain no action against the vendor; it, therefore, would be an extreme hardship if the plaintiff could sue the broker in the first instance. In the next place, the measure of damages is wrong. If the defendant's negligence has injured the plaintiff, the degree of injury he has received is the measure of damages. If the tobacco had been the defendants', it might be thrown back upon them, but it cannot be thrown back upon those who never were owners of it. It never was the defendants'. The plaintiff possesses an article which belonged to *Scott, Burn, & Co.*, and is now his own. The defendants may be liable for the difference in price between good and bad tobacco, but that does not satisfy the plaintiff; he wants to throw the tobacco on the defendants, and requires payment for the whole value. [*Burrough, J.* By the negligence of the defendants, a certain sum of money has been recovered against the plaintiff, whose correspondent repudiated the contract altogether, and the defendants refused to defend that action.] The defendants were not bound to defend; they might keep aloof, and say, they would pay in money whatever loss they might have occasioned. The only measure of damages is, either the difference between the relative prices of the article in the *London* market, or between the relative values in the market in *Holland*, and does not
 *207] depend on the subsequent deterioration of the goods. The defendant is, therefore, entitled to the judgment of the court.

DALLAS, J. After stating the facts of the case. It would be very hard if a merchant employed to buy goods, and employing a broker of the first character, should be answerable for the negligence of that broker. It was proved, that the broker might have examined the tobacco in bulk, and that if he had done so, he would have been convinced that the tobacco was not *Porto Rico* tobacco of the best quality. In fair and regular dealing, if the defendants could not have purchased *Porto Rico* tobacco of the best quality, they ought to have said, that they had not been able to buy tobacco of that quality, and that they had bought that which was inferior. It has been said, that *Porto Rico* tobacco of the best quality, is of a description known in the market as distinguished from the inferior tobacco. So, also, is the price known in the market; and, taking the price and the name together, it would have appeared to the plaintiff as the best, and it cannot be considered that the bought-note is a waiver: that note is ambiguous, but the ambiguity is explained by the price, and it amounts to a representation of having been bought as of the best quality. Both of these parties are agents; and, as the ultimate purchaser had a right to recover against the plaintiff, so has he the like right to recover against the defendants. I am of

opinion, therefore, that this action is properly brought. As to the other question, whether the measure of damages has been properly taken, the court will consider, and hereafter deliver their opinion.

PARK, J., and BURROUGH, J., concurred

*The next day, *Dallas, J.*, delivered the opinion of the court, that the measure of damages ought to be the damages and costs recovered in the action against the plaintiff, the plaintiff undertaking to assign the tobacco to the defendants, or to sell it, and account to the defendants for the produce. [*208]

Rule discharged

GLYN, Bart. et al. v. HERTEL.

[2 Moore 33. S. C.]

The plaintiffs declared that, in consideration that they would lend to *S. & Co.* 5000*l.*, the defendant promised to be answerable for the same; that they did lend the said sum, whereby the defendant became liable. The form of the guarantee was, that the defendant would be answerable to the extent of 5000*l.* for the use of the house of *S. & Co.* At the time this was given, *S. & Co.* were indebted to the plaintiffs in a considerable sum of money, for which the plaintiffs held a promissory note, drawn by *S. & Co.*, and other bills, as a security. On receiving the guarantee, the plaintiffs cancelled the note, and delivered up the bills which they held. *S. & Co.* then delivered those bills back again to the plaintiffs, together with a new promissory note, but no money passed: Held, that the guarantee only contemplated future loans, and that the transaction did not amount to a loan of money so as to charge the defendant.

ASSUMPSIT on a guarantee. The first count of the declaration stated, that on the 1st of *May*, 1815, in consideration that the plaintiffs, at the request of the defendants, would lend and advance to certain persons using the stile and firm of *Spitta, Molling, & Co.*, divers large sums of money, amounting to 5000*l.*; the defendant undertook, and promised the plaintiffs that she would be answerable for, and re-pay to the plaintiffs the said sums of money, to the extent of 5000*l.*, when she should be thereto requested. And the plaintiffs averred, that they did lend and advance to the said *Spitta, Molling, & Co.*, divers sums of money, to wit, 5000*l.*, and by reason thereof, the defendant became liable to answer for, and pay to the *plaintiffs the said sums of money. There were three other special counts on which nothing turned, and the usual [*209] money counts. Plea, the general issue.

The cause was tried before *Dallas, J.*, at the *London* sittings after *Michaelmas* term, 1816, when a verdict was found for the plaintiffs for 5000*l.*, the amount of the damages laid in the declaration, subject to the opinion of the court, on a case of which the following is the substance.

The plaintiffs are bankers in *London*, and in the year 1815, and for some time previous thereto, the house of *Spitta, Molling, & Co.*, who then carried on business as merchants in *London*, kept a banking account with the plaintiffs. The defendant is the aunt of *Frederic* and *Godfrey Molling*, two of the persons constituting the firm of *Spitta, Molling, & Co.*, and had from time to time made advances to a considerable amount in aid of *Spitta, Molling, & Co.*, and to meet various embarrassments of that house. In *October*, 1814, a loan of 10,000*l.* was made to *Spitta, Molling, & Co.*, by the plaintiffs, as security for which, the plaintiffs received from them their promissory note, payable on demand for 10,000*l.*, and bills of exchange to the amount of 3491*l.* 6*s.* 11*d.*, which bills were afterwards paid, and on the 2nd of *May*, 1815, *Spitta, Moll-*

ing, & Co., as a further security for the sum of 650*l.* 13*s.* 1*d.* the balance of the 10,000*l.*, deposited with the plaintiffs two bills of exchange, accepted by *Ferdinand Moller* of *Konigsberg*, amounting altogether to 3528*l.* 16*s.* 2*d.*, but which last mentioned bills did not become due until after the 24th of *May*, 1815.

On the 3d of *May*, 1815, the plaintiffs discounted for *Spitta, Molling, & Co.* their draft on the plaintiffs for the sum of 2733*l.* 0*s.* 4*d.* for a limited period, viz. until the 11th of the same month, upon the specific security of two bills
 *210] of exchange, amounting together *to 2833*l.* 0*s.* 4*d.*, but which last mentioned bills did not become due till after the 24th of *May*, 1815.

On the 13th of *May*, *Spitta, Molling, & Co.* had overdrawn their cash account with the plaintiffs 2103*l.* 18*s.* 10*d.*, and being pressed by the plaintiffs for payment of, or further security for, the debts due to them, deposited with them seven bills of exchange, amounting together to 2767*l.* 13*s.* 7*d.*, but which bills did not become due until after the said 24th of *May*.

In the same month of *May*, and previous to the date of the defendant's letter of guarantee hereafter mentioned, the plaintiffs being under the said advances for *Spitta, Molling, & Co.*, and their accounts with the plaintiffs being in a very unsatisfactory state, and the plaintiffs having reason to believe that *Spitta, Molling, & Co.* would want further advances, insisted on payment of the same sum, then due by *Spitta, Molling, & Co.*, or on having further security. On the 16th of the same month of *May*, the plaintiffs sent for *Frederic Molling*, and suggested to him the procuring of the security of the defendant to a limited extent; and an appointment was then made for a meeting to take place on the 24th of *May*, 1815, between *Frederic Molling* and one of the plaintiffs, for the purpose of adjusting the account between them, and arranging such security as should be satisfactory to the plaintiffs, and an inducement to let *Spitta, Molling, & Co.* have such accommodation of money, by way of loan, as their necessities should require, and as the plaintiffs should think fit to make. On the 16th of *May*, the plaintiffs sent the following letter, dated *London, May 16*, 1815, to the defendant: "So many communications have passed confidentially between yourself and some of our firm, upon the concerns of the house in *Laurence Pountney Lane*, that we feel no hesitation in addressing you on the sub-
 *211] ject. From the long-standing connection, we feel every disposition *to

assist them with advances of money, but at the same time, we must require to have good security for what we do; and as foreign remittances are now very much in arrear, and they require ready money for the transaction of their business here, we beg to submit to you the propriety of our having a guarantee for the assistance afforded them by this house, which, we trust, you will have no hesitation in giving to a limited extent, say to the amount of 5000*l.* A letter to the effect of that written on the other side, by post, will suffice, and we shall thank you for an early answer." The form of the guarantee mentioned in that letter was in the following terms: "Gentlemen, I have to offer you my guarantee for the transactions in the account of Messrs. *Spitta, Molling, & Co.* with your house, to the extent of five thousand pounds. I am, &c."

This letter was addressed to the defendant at *Bath*, but she being at *Clifton* when it arrived, did not receive it till her return to *Bath* on the 19th, when she sent to the plaintiffs the following answer, dated *May 19*, 1815: "I am this moment returned from *Clifton*, and the post is just going; I have only time to say that I will be answerable for the extent of 5,000*l.* for the use of the house of *Spitta, Molling, & Co.*" The plaintiffs received this answer by the post on the 20th, and before, and at the time of its receipt, *Spitta, Molling, & Co.* had overdrawn their cash account with the plaintiffs, (including the amount overdrawn on said 13th of *May*,) 2212*l.* 16*s.* 10*d.*; the debit side of their account amounting to 134,282*l.* 1*s.* 1*d.*, and the credit side to 132,069*l.* 4*s.* 3*d.* No transactions took place between *Spitta, Molling, & Co.*, and the plaintiffs, in consequence of the receipt of the defendant's letter of guarantee, till the 24th

of *May*, and the debts due from *Spitta, Molling, & Co.* to the plaintiffs were the same on *that day as when the letter of guarantee was received, and [*212 were as follows :

Balance of the loan of 10,000 <i>l.</i> advanced in <i>October</i> , 1814,	6508	13	1
Interest thereon to 24th <i>May</i> , stated in the schedule in two sums, viz.	79	4	10
	66	17	3
		146	2 1
Loan on a check discounted from 3d to 11th <i>May</i> , 1815, but not then paid off, - - - -	2733	0	4
Interest thereon from 11th to 24th <i>May</i> , - - - -	4	17	4
Cash account overdrawn, (including 2103 <i>l.</i> 18 <i>s.</i> 10 <i>d.</i> overdrawn on 13th of <i>May</i> .) - - - -	2212	16	10
Interest on sums overdrawn from 11th to 24th of <i>May</i> , - - - -	3	15	1
Total debt due to the plaintiffs,	£11,609	4	9

As a security for this debt, the plaintiffs, at the date of the letter of guarantee, and on the 24th of *May*, held the following bills:

Two bills on <i>Moller</i> , deposited the 2d <i>May</i> , 1815, as a security for 6508 <i>l.</i> 13 <i>s.</i> 1 <i>d.</i> , the balance of the note of 10,000 <i>l.</i> amounting together to - - - -	3528	16	2
Two bills deposited 3d <i>May</i> , 1815, as a security for 2733 <i>l.</i> 0 <i>s.</i> 4 <i>d.</i> , the amount of the check then discounted, till 11th <i>May</i> , amounting to - - - -	2833	0	4
Seven bills deposited 13th <i>May</i> , 1815, as a further security for the debt then due to the plaintiffs, (one of which was the bill on <i>Lange</i> for 2102 <i>l.</i> 15 <i>s.</i> 7 <i>d.</i> after mentioned,) amounting together to - - - -	2767	13	7
Total securities held by the plaintiffs,	£9129	10	1

*On the 24th of *May*, a meeting took place at the banking house of the plaintiffs between the plaintiff, *Charles Mills*, and *Frederic Molling*. [*213 in pursuance of the appointment before mentioned, for the purposes stated at the time of making the said appointment, at which meeting the plaintiffs discounted for *Spitta, Molling, & Co.*, the two bills deposited on the 3d of *May*, amounting to 2833*l.* 0*s.* 4*d.*, six of the seven bills deposited on the 13th of *May*, amounting together to 664*l.* 18*s.*, and twelve other bills amounting together to 3080*l.* 13*s.* 3*d.*, which *Frederic Molling* brought with him on that day to be discounted, and placed the sum of 6578*l.* 11*s.* 7*d.*, the amount of the said twenty bills of exchange, to the credit of the cash account of *Spitta, Molling, & Co.*, with the plaintiff, and debited the same account with the sum of 63*l.* 14*s.* 9*d.*, for the discount of the said twenty bills; and all the said twenty bills were subsequently paid as they became due. At the same meeting, *Frederic Molling*, on behalf of the firm of *Spitta, Molling, & Co.*, drew a promissory note to the amount of 6500*l.* payable on demand, in favor of the plaintiffs. *Charles Mills* then handed to *Frederic Molling* the said two bills of exchange for 3528*l.* 16*s.* 2*d.*, accepted by *Ferdinand Moller*, (which had been deposited with the plaintiffs on the 2d of *May*, and then remained in their hands as a security for the said sum of 6508*l.* 13*s.* 1*d.*;) and the said letter of guarantee of the defendant, (which had been received by the plaintiffs on the 20th of *May*, and had ever since remained in their hands, as before stated,) for the purpose

of being inclosed by him in a letter, specifying on what account such securities were deposited, as it was customary for the house of *Spitta, Molling, & Co.* to do, when they deposited securities with the plaintiffs; and *Frederic Molling* accordingly, whilst he was in the plaintiffs' *banking-house with *Charles*
 *214] *Mills*, wrote the following letter to the plaintiffs, dated the 24th of *May*, 1815, and inclosed therein the said two bills of exchange, accepted by *Ferdinand Moller*, and the defendant's letter of guarantee.

"Enclosed we beg to hand you two bills 2000*l.* dated 15th *April*, four months; 1528*l.* 16*s.* 2*d.*, 16th *April*, four and a half months, on *F. Moller, Konigsberg*, and a letter from *Mrs. A. Hertel*, guarantee for 5000*l.* which we deposit with you as a collateral security against our note for 6500*l.* from this date."

Frederic Molling also, while he was in the plaintiffs' banking-house, drew, in the name of the house of *Spitta, Molling, & Co.*, a draft on the plaintiffs to the amount of 6508*l.* 13*s.* 1*d.*, being the balance due on the promissory note of *October*, 1814, in favor of the plaintiffs, and which draft he gave to *Charles Mills* with the promissory note for 6500*l.*, and the said letter of the 24th of *May*, with the inclosures. The plaintiffs thereupon placed the said sum of 6500*l.*, the amount of the new promissory note, to the credit of the cash account of *Spitta, Molling, & Co.*, with the plaintiffs, and the old promissory note of *October*, 1814, was thereupon cancelled; and the plaintiffs delivered up to *Spitta, Molling, & Co.*, a bill of exchange accepted by *J. W. Lange*, for 2102*l.* 15*s.* 7*d.*, which had been deposited on the 13th of *May*, as a collateral security for past advances, and which bill the plaintiffs did not choose to discount. This bill was the only security then remaining in the hands of the plaintiffs for the debt due before the 24th of *May*, except the two bills of exchange for 3528*l.* 16*s.* 2*d.* which had been again deposited, as before stated, as a security
 *215] for the new promissory note. *The plaintiffs then debited the account of *Spitta, Molling, & Co.* with the several sums of 2733*l.* 0*s.* 4*d.*, the amount of the draft of the 3d of *May*; 63*l.* 14*s.* 9*d.* the amount of the discount of the twenty bills of exchange; 6508*l.* 13*s.* 1*d.* the amount of the draft of the 24th of *May*, for the balance of the note of *October*, 1814; and four several sums, making together 154*l.* 14*s.* 6*d.* the amount of interest due to the plaintiffs up to the 24th of *May*, on the several advances made by them, making together with the sum of 2212*l.* 16*s.* 10*d.* the amount of cash overdrawn, the sum of 11,672*l.* 19*s.* 6*d.* to the debit of *Spitta, Molling, & Co.*

No money passed in the course of this transaction. The difference between 11,609*l.* 4*s.* 9*d.*, the debt due to the plaintiffs before the 24th of *May*, and 13,078*l.* 11*s.* 7*d.*, the amount of the two sums credited to *Spitta, Molling, & Co.* on that day, viz. 1469*l.* 6*s.* 10*d.* was applied as follows, viz. 63*l.* 14*s.* 9*d.*, part thereof in satisfaction of the said discount of the 24th of *May*, and 1405*l.* 12*s.* 1*d.* residue thereof was paid by the plaintiffs to the order of *Spitta, Molling, & Co.* in consequence of drafts drawn by the latter in favor of various persons, between the 24th of *May* and the 10th of *June*, 1815, inclusive. Cash payments to a considerable amount were made and received by the plaintiffs, on the general account-current of *Spitta, Molling, & Co.*, with them. It appeared by a copy of the ledger, annexed to the case, that between those last mentioned days the account of *Spitta, Molling, & Co.* with the plaintiffs, after allowing credit to *Spitta, Molling, & Co.* for the sums of 6578*l.* 11*s.* 7*d.* and 6500*l.* as cash, and including, on the debit side of the account, the old debt of 11,609*l.* 4*s.* 9*d.* due to plaintiffs before the guarantee was over-drawn on the 28th
 *216] of *May*, 1815, to the amount of 445*l.*, and on the 29th of *May*, the *further sum of 236*l.*, making the whole amount overdrawn on the said 29th of *May*, 681*l.*

On the 30th of *May* the plaintiffs discounted for *Spitta, Molling, & Co.*, bills to the amount of 2935*l.* 4*s.* 4*d.*, and carried that sum to the credit of their cash account, (debiting the account with 19*l.* 16*s.* 1*d.*, the amount of the discount

on such bills,) by which the said cash balance of 681*l.* was paid; but towards the close of that day, *Spitta, Molling, & Co.*, having drawn drafts upon the plaintiffs, to an amount exceeding the sum standing to the credit of their cash account by 332*l.* 10*s.* 2*d.*, one of the plaintiffs sent to *Frederic Molling*, telling him, that the account was rather overdrawn, and that the plaintiffs must have money paid in; and thereupon *Frederic Molling* gave the plaintiffs a draft upon *Smith, Payne, & Co.*, for 350*l.*, which was paid, and carried to the credit of the cash account of *Spitta, Molling, & Co.* On the 10th of *June*, 1815, on which day the house of *Spitta, Molling, & Co.*, stopped payment, the balance of the cash account of *Spitta, Molling, & Co.*, with the plaintiffs, considering the said sum of 6500*l.* as cash, was in favor of *Spitta, Molling, & Co.*, 42*l.* 18*s.* 1*d.*

The two bills for 3528*l.* 16*s.* 2*d.*, had been duly paid, which, together with the balance of 42*l.* 18*s.* 1*d.*, being deducted from the said sum of 6500*l.*, the amount of the promissory note of the 24th of *May*, 1815, left a balance remaining due from *Spitta, Molling, & Co.* to the plaintiffs, in respect of the said sum of 6500*l.* of 2928*l.* 5*s.* 9*d.*, which the plaintiffs claim of the defendant, with 158*l.* 14*s.* 4*d.*, for interest thereon to the 1st of *March*, 1816, making together 3087*l.* 0*s.* 1*d.*

Before the letter of guarantee was sent, the plaintiffs had discounted for *Spitta, Molling, & Co.*, bills to the amount of 32,698*l.* 7*s.* 1*d.*, which had not then become *due, all of which had been since duly paid, except a [*217 bill of exchange accepted by one *Grellett*, and indorsed by *Spitta, Molling, & Co.*, for 1235*l.* 10*s.* 10*d.*, which was discounted by the plaintiffs on the 17th of *March*, 1815, and became due on the 18th of *June*, 1815, when it was dishonored, and *Spitta, Molling, & Co.*, became indebted to the plaintiffs in the sum of 4322*l.* 10*s.* 11*d.*, being the amount of the balance of 3087*l.* 0*s.* 1*d.*, and the bill on *Grellett* taken together, and which sum of 4322*l.* 10*s.* 11*d.*, the plaintiffs claimed of the defendant.

The plaintiffs had proved their debt under the commission of bankrupt issued against *Spitta, Molling, & Co.*, and had received three dividends thereon, amounting together to 6*s.* 1*d.* in the pound.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover from the defendant the said sum of 4322*l.* 10*s.* 11*d.*, deducting therefrom the dividends received under *Spitta & Co.*'s commission, or any, and what part thereof.

If the court should be of opinion that the plaintiffs were entitled to the said sum, or any part thereof, the verdict to be entered accordingly.

If the court should be of opinion that the plaintiffs were not entitled to recover any thing, a nonsuit to be entered.

The case was argued in the last term.

Bosanquet, Serjt., for the plaintiffs. The material fact is, that the sum of 11,609*l.* 4*s.* 9*d.*, was due previously to the 24th of *May*, and it also appears, in the latter part of the case, that the sum of 4322*l.* 10*s.* 11*d.*, is now due to the plaintiffs. It is, therefore, necessary to explain how the account in the ledger appears to be 42*l.* in favor of *Spitta & Co.* *Grellett's* bill may be laid out of consideration for the present, and the plaintiff's claim may be considered to be for the balance, *independent of that. The cash over drawn, the [*218 two loans, and the interest, make up the sum stated as 11,609*l.* 4*s.* 9*d.* There was nothing extraordinary in this transaction. The only sums which appear in the common ledger are the sums paid and drawn in the ordinary banking account. The parties meet, and these loans are brought into account, and *Spitta, Molling, & Co.*, give a note for 6500*l.*, which is merely a voucher authorising the bankers to enter in the banking account that which was before a mere private transaction between the parties. It is not contended, that any part of this money due before the 24th of *May*, is to be taken as money advanced afterwards. The amount of the drafts on, and subsequently to, the

24th of *May*, independently of the old debt, was upwards of 11,000*l.* This is wholly exclusive of the moneys paid before that day.

On the credit side there is a promissory note for 6500*l.*, which has not been paid. It is a very common practice for bankers, if a bill or note is delivered by a customer, which is not yet paid, to credit the customer with the amount, and if the bill becomes dishonored, to debit him with the bill unpaid, and so correct the account. The two bills of exchange given that day as a security for the 6500*l.*, were paid, but the balance between the two bills and the 6500*l.*, was not paid; that balance never has been paid, and still remains due. That sum then, is to be deducted from the credit side of the account. It is admitted, that payments have been made sufficient to cover all the payments prior to the 24th of *May*, and also all subsequent payments, except the balance the plaintiffs claim, and they have a right to apply the payments of the credit side of the account to satisfy such part of the debit side of the account as they please, *Kirby v. Duke of Marlborough*, 2 Maul. & Selw. 18. In that case, *Coburn*

*219] *was indebted to the *Oxford* bank. The Duke of *Marlborough* being applied to, gave security to the *Oxford* bank for 3000*l.*, to be advanced to *Coburn*; the bank advanced him much more than 3000*l.*, and *Coburn* paid the bank more than 3000*l.* One question was, whether that was a continuing guarantee, which does not apply here. The duke also contended, that the bank was bound in equity to apply their first receipts to relieve his guarantee: but it was held otherwise; and that the bank might first relieve themselves, and sue the duke for the balance. *Bosanquet v. Wray*,† is a still stronger case. There, *Beechcroft* had been a partner in two banks. The surviving partners of *Beechcroft* in the *London* bank, sued the surviving partners of *Beechcroft* in the country bank. It was urged, that they were tenants in common and could not sue, to which the other side agreed; but they said, we will apply the payment since *Beechcroft's* death, to the balance against him in his life, and sue for the balance accrued since his decease, *Peters v. Anderson*,‡ is also in point. Here then, is the whole question. The plaintiffs say they will apply all *Spitta, Molling, & Co.*, have paid in, to the credit of the antecedent debt, and will sue the defendant on her guarantee, for 5000*l.* The plaintiffs do not want the aid of that which was clearly the intent of all the parties, viz., that the credit of the defendant should be applied to discharge the balance then owing. It may be asked what benefit *Spitta, Molling, & Co.*, have had?—A very great benefit: they were falling. In the end of *May* the plaintiffs found they must hold their hand; they found that payments were made, but how? *Spitta, Molling, & Co.*, paid in bills; for them they got cash; if the bills turned out

*220] solvent, well; if bad, then *it became a cash advance; and by these aids *Spitta, Molling, & Co.*, would have struggled through their difficulties, but for unforeseen events elsewhere. Now, as to *Grellett's* bill, it was lodged with the plaintiffs, and *Spitta, Molling, & Co.*, had credit for it. It was not payable until *Spitta, Molling, & Co.*, stopped payment, but afterwards it increased the debt; they still owe it; it was a credit which they had then, which they ought not to have had. Even admitting that it was discounted before the 24th of *May*, that it was a debt before that time, yet it only increases the balance due on the 24th of *May*: but, if it be so, it only requires the plaintiffs to apply to the discharge of that antecedent debt, 1235*l.* more of the 20,000*l.* which have been paid since the 24th of *May*. If it be a debt arising since the 24th of *May*, a *fortiori*, it is within the guarantee. But, supposing for any reason whatever, these sums are not to be recoverable, yet, at all events, there is a balance of 1400*l.* and upwards. [*Dallas, J.* It is not at all disputable, that it is a prospective guarantee. I thought at the trial that it was merely prospective, and think so still.]

Hullock, Serjt., The cases cited only apply to cases founded on similar facts

† *Ante*, vi. 597. S. C. 2 *Marsh*, 319.

‡ *Ante*, v. 596. S. C. 1 *Marsh*, 233.

The only question is, whether, under all the circumstances, there was that sort of advance subsequent to the guarantee which the instrument contemplated? The declaration and its language are very material. The declaration states, that in consideration that the plaintiffs would lend to *Spitta, Molling, & Co.*, divers sums amounting to 5000*l.*, the defendant undertook to repay the plaintiffs the said sums to the extent agreed upon, to wit, 5000*l.* The consideration is palpably a future loan. No part of the case shows, that from the date of the guarantee a shilling was advanced to *Spitta, Molling, & Co.* The *ques- [*221 tion is not, whether *Spitta, Molling, & Co.*, were indebted to the plain- tiffs in 4000*l.* and upwards; but whether in point of law the defendant is liable to the debt. The defendant's liability is not to be sought for in the extent of the debt of *Spitta, Molling, & Co.*, but in the extent of her own engagement on the 24th of *May*: the sole object of the plaintiffs, having got this guarantee, was, to make the defendant answerable for a bye-gone debt. It is now contended, without any foundation, that a new promissory note for 6500*l.* will extinguish an old promissory-note for 6500*l.* It would have been desirable if the plaintiffs had intended to get a guarantee for bye-gone transactions, and it would have been no more than candid in them, to have apprised the defendant of the balance then due. A guarantee is materially affected by the circumstance of its being a security for a past or a future loan. If the defendant had signed the guarantee which the plaintiffs sent her, they would have had a stronger case; but she declines that, and says, "I will be answerable for the extent of 5000*l.* for the use of *Spitta, Molling, & Co.*" According to the doctrine of *Mansfield, C. J.*, in *Dance v. Girdler*, 1 N. R. 34, a guarantee is to be construed most strictly. It cannot be said that the intent of the defendant by this answer was to make herself liable for an old debt. Supposing all the transactions previous to the 24th of *May*, had not existed, would any one argue that the depositing of the bills on *Moller*, on that day, and the giving of the promissory-notes, was a loan? On that day 6508*l.* was due on a promissory-note given in 1814, for 10,000*l.*, which had been reduced by payments, and then stood as a security for the balance; two other bills for 3000*l.* had been also lodged with the plaintiffs for *securing that balance: these two bills are [*222 handed back to *Molling*, who lodges them again as a security for the old balance, and then the plaintiffs say to him, "Now we have but your 3000*l.*" The framing of the latter part of the case is also worthy of attention. The plaintiffs there state that they seek to recover the old balance. This puts them out of court, unless that change of notes can be made a loan of money. But the cancelling an old note and giving a new one cannot be called a loan of money even to a principal, *a fortiori*, not to a surety. A forbearance of an old debt is substantially different from a new loan, though both may be equally beneficial to the principal. The whole question is,—has there been a loan of money? And as the giving of a new note in consideration of the cancelling of an old one, does not in law amount to a loan, the defendant is entitled to the judgment of the court.

Cur. adv. vult.

DALLAS, J., on this day having read the first count of the declaration, and stated that the others were not to be distinguished from it in substance, proceeded to give judgment.

The action is, for money lent and advanced by the plaintiffs to *Spitta, Molling, & Co.*, on the credit of a guarantee, proposed to be, and in fact given by the defendant to the plaintiffs.

Before coming to the substance of the case, it may be proper to consider the relative situation of the different parties. The plaintiffs are bankers, and have made from time to time advances upon different securities to the house of *Spitta, Molling, & Co.* The transactions, as stated in the case, begin with *October*, 1814, at which time a loan appears to have been made to *Spitta, Molling &*

Co., of 10,000*l.*, by the plaintiffs, on the security of a promissory-note given by *223] *Spitta, *Molling, & Co.*, together with other securities they then held, but not to the full amount they had advanced. From this time, down to 1815, different transactions took place between the parties; and in *May*, 1815, the banking-house, taking alarm at the state of the account, compared with the securities they held, wrote to the defendant, in substance informing her that they were in considerable advance to *Spitta, Molling, & Co.*; and as foreign remittances came in slowly, and as they foresaw that further advances of ready money would be necessary for them, proposed she should send her guarantee to the amount of 5000*l.*, for the transactions between the two houses.

The defendant, who was a lady living in *Gloucestershire*, does not appear to have had any interest in the transaction; and it is to be observed, that no request of an advance to the house of *Spitta, Molling, & Co.*, nor any offer of security appears to have proceeded from her, but, that the proposal originated with, and proceeded from, the plaintiffs themselves: owing to her absence from home when this letter was received, some little delay took place, and, on her return, a speedy answer having been pressed for, she, without consultation (for aught that appeared) with any friend or legal adviser, by the post of the same day sent off the engagement, on the faith of which the advances are stated to have been made, and which it is the purpose of this action to recover. It appears, however, that she had been in the habit of assisting the house before, by becoming security for different advances to relieve them from embarrassments; her situation, therefore, is that of a mere guarantee, undoubtedly liable to the full extent of her engagement, legally considered, with reference to the terms of it, and connected with the facts of the case, but entitled to the application of

*224] the rule laid down *in all such cases, namely, that as a security, the contract cannot be carried beyond the strict letter, and certainly not beyond the plain and manifest intent. I pass over the precise language of the guarantee proposed by the plaintiffs, and even the terms of it, as finally given by the defendant, referring to the statement of them in the case; and for this reason, that if any doubt might have been raised, whether it had application to past transactions or to subsequent only, in which view the reading of each might have been material to aid a doubtful construction, yet, inasmuch as the action proceeds altogether on the footing of the guarantee being prospective only, all other consideration is rendered immaterial.

The declaration states, that in consideration that the plaintiffs would lend and advance, the defendant undertook to guarantee the sums so lent and advanced; and it then avers, as, of course, it was necessary it should aver, that money was lent and advanced on the faith of the guarantee. Has there then been, on the security of the guarantee in question, any money actually lent and advanced? It appears, that on the 24th of *May*, three or four days after the receipt of the guarantee, it was deposited with the plaintiffs by one of the *Mollings*, and applied by the very terms of the letter inclosing it, to the specific purpose appearing upon the face of that letter; that is, as a security, together with two bills amounting to 3528*l.* 16*s.* 2*d.* which, having been in the hands of the plaintiffs as a security before, were handed over, or shifted from hand to hand, at the time; that is to say, were delivered for the purpose of being re-delivered as a security for a new promissory-note of 6500*l.* which was given in lieu of an old note of the date of *October*, 1814, that is, upwards of six months previous to the guarantee; which old note, on their receiving the new one, was given up

*225] and cancelled; and it is expressly stated, that *no money whatever passed on that day in the course of these transactions between the parties. Now, whatever may be the effect of a variety of circumstances, which are considered as supporting an averment of money had and received, though no money had ever actually passed, the question may or may not be different, as to a third party, and still more so, when that party stands in the situation of a surety, who can be liable only on the precise terms of her obligation, apply-

ing to it the strict construction of law. I merely advert to this distinction; it will not be necessary to pursue it into detail, according to the view the court takes of the case, the material and substantial question being, in effect, was there, as between the plaintiffs and the defendant, any money lent or advanced, or that which must be deemed equivalent to money lent and advanced, as against the surety, subsequent to the guarantee, and on the faith of the guarantee, by the house of the plaintiffs, to *Spitta, Molling & Co.*?

In the plain meaning of the thing, we all think the proper and obvious course would have been an advance of so much money, leaving the past transactions as they were, to be liquidated and adjusted by other means, or by the gradual progress of the other securities, at the advance of other funds of the house. It is manifest that this has not been the direct course of proceedings between the parties, nor do we think the indirect or ultimate result of those proceedings establishes the averment made in the declaration, according to the best construction we have been able to give them. They appear to us to consist in the interchange of existing securities, connecting the past with the present, so as to endeavor to give the guarantee a retrospective operation. Taking, therefore, the facts as we find them in the case, our opinion is, that the several *trans- [*226 actions do not amount to a loan and advance of money, so as to satisfy the words of the declaration, as between the parties themselves, and still less so, as against the defendant; applying the principles of law, she is entitled to have applied in the construction of the engagement into which she has entered. This relates as well to the transactions on the 24th of *May*, as to the other subsequent dealings and transactions up to the time of the stopping payment of the house of *Spitta, Molling, & Co.*: we are therefore, of opinion that a nonsuit must be entered.

Judgment of nonsuit.

DAWSON Demandant, STOCKER Tenant, BROOKE Vouchee.

Præcipe directed to the vouchee, amended by inserting the name of the tenant.

THE writ of entry, dedimus, and warrant of attorney were right, but the præcipe at the head of the warrant of attorney was, "Command *Brooke*, (the vouchee,) that he render to *Dawson*, (the demandant,)" &c.

Hullock, Serjt., moved to amend this recovery, by substituting the name of the tenant for that of the vouchee.

Fiat.

*CANHAM v. RUST.

[*227

[2 Moore 164. S. C.]

A term for years was limited to A., the plaintiff's testator, for securing a sum of money, and the defendant, in the mortgage-deed, covenanted with A., his executors, administrators, and assigns, to pay the money at a certain day; after that day, A. died, having bequeathed to the plaintiff the sum so secured, and appointed the plaintiff and another his executors. The co-executor assented to the bequest. In an action on the covenant, brought by the plaintiff in his own right: Held, that he was not entitled to sue as assignee; first, because the covenant was merely personal; and, secondly, because the breach occurred in the testator's lifetime.

COVENANT. The declaration stated, that by an indenture dated the 4th of

August, 1807, and made between *John Canham*, since deceased, of the first part, the defendant of the second part, and *Thomas Lowten* of the third part; after reciting, that *John Canham* had contracted with the defendant for the sale of certain lands for the sum of 420*l.*, and that it had been agreed, that part of the said sum of 420*l.* should be secured to be paid to *John Canham* in manner thereafter mentioned, it was witnessed, that in consideration of 25*l.* to *John Canham* then paid, of the sum of 395*l.*, intended to be secured to him in manner thereafter mentioned, *John Canham* did grant, bargain, sell, and release unto *Thomas Lowten*, his heirs, and assigns the said lands, to hold the same unto *Thomas Lowten*, his heirs, and assigns, to the use of *John Canham*, his executors, administrators, and assigns, for the term of a thousand years, subject to the proviso thereafter mentioned, and subject to the said term, to such uses as the defendant might appoint, and in default of appointment, to the use of the defendant and his assigns for his life; with remainder to the use of the said *Thomas Lowten*, his heirs and assigns, during the life of the defendant, upon trust, for the defendant and his assigns; with remainder to the only proper use of the defendant, his heirs and assigns; and that in the same

*228] indenture was contained a proviso, making void the same term on payment by the defendant, his heirs, executors, administrators, or assigns, to the said *John Canham*, his executors, administrators, or assigns, of the said sum of 395*l.*, with interest for the same, in manner thereafter mentioned; that is to say, 25*l.* on the 25th of *March*, 1808, and 370*l.*, with interest, on the 25th of *March*, 1810: and that the defendant, by the said indenture, for himself, his heirs, executors, and administrators, covenanted with *John Canham*, his executors, administrators, and assigns, to pay the said sum of 395*l.* and interest, in the manner in the said indenture mentioned for payment thereof. The plaintiff then averred, that *John Canham*, being so possessed of the said term of years, on the 9th of *June*, 1813, duly made and published his last will and testament, and thereby gave and bequeathed to the plaintiff the said sum of money, then due and owing to *John Canham* from the defendant, and appointed *Anthony South Canham* and the plaintiff executors of his said will, and on the 15th of *November*, 1814, died, so possessed of the said term of years, without having revoked or altered his said will with respect to the said bequest; and, that on the 29th of *December*, 1814, *Anthony South Canham*, and the plaintiff, duly proved the will, and took upon themselves the execution thereof, and assented to the said bequest to the plaintiff, whereby he was entitled to receive from the defendant the said sum of money. The plaintiff then assigned for breach, that the defendant had not paid to *John Canham*, his executors, administrators, or assigns, the said sum of 395*l.*, but that, on the contrary thereof, 345*l.*, part of the said sum of 395*l.*, was due to him from the defendant, together with 34*l.*, 10*s.* for interest thereon. *The defendant having

*229] craved *oyer* of the will, to which, it appeared, the testator had added two codicils, pleaded, first, that the said *John Canham* did not give or bequeath to the said plaintiff the said sum of money, in the said declaration alleged to be due and owing to the said *John Canham* from the defendant; secondly, that the plaintiff did not become, nor was, nor is entitled to receive of and from the defendant the said sum of money, in manner in the said indenture limited for the payment thereof, according to the said covenant of the defendant, in the said indenture in that behalf contained; thirdly, that the said *Anthony South Canham* and the plaintiff did not assent to the said bequest to the plaintiff; and, fourthly, that the said *Anthony South Canham* alone did not assent to the bequest to the plaintiff. On all these pleas issue was joined.

The cause was tried before *Gibbs*, C. J., at the last assizes for *Norfolk*, when the assent of *A. S. Canham*, the co-executor, was fully proved, and the chief justice directed the jury to find for the plaintiff, subject to a motion in arrest of judgment, he having sued in his own name, and not as executor.

Blosset, Serjt., in the last term, had accordingly obtained a rule *nisi* for arresting the judgment.

Lens, Serjt., on a former day showed cause. The question is, whether this is a mere personal covenant in gross, or whether it does not entitle the person who has the whole interest, to sue. The testator bequeaths the sum due to him on the mortgage to the plaintiff, his executors, administrators, and assigns. Here the assigns being named, the law in *Spencer's* case, 5 *Rep.* 16, is applicable. The executors have, by their assent, divested this estate from themselves, and vested it in the plaintiff. *This, then, is not a mere covenant in gross, and the plaintiff may, therefore, bring this action, and is [*230 not bound to sue in the name of the executors.

Blosset, Serjt., in support of the rule. This is a direct bequest of the money, and not of the term, and the covenant does not run with the land. A covenant by a publican to pay for beer during the lease of the public house is collateral, and does not pass to the assignee. *Godbolt*, 120. That is a much stronger case than this. Besides, covenant does not lie by an assignee for a breach done before his time, *Comyns' Digest*, Covenant, B. 3; and on the face of this declaration, it appears that the covenant was broken in the life time of the testator, for it was to have been performed on the 25th of *March*, 1810; and on non-payment on that day, there was a clear breach.

Cur. adv. vult.

On this day, *Dallas*, J., delivered the judgment of the court as follows:

The question for the consideration of the court is, how far the plaintiff can avail himself of the circumstances disclosed by his declaration. This depends entirely on the construction of the covenant made between the defendant and the testator. The leading principles, as to the construction of covenants of this description, in which an assignee has or has not a right to sue or be sued, are laid down in *Spencer's* case, and the resolutions there adopted have been recognised and established in the cases of *Balley v. Wells*, 3 *Wills*, 25, and *Gray v. Cuthbertsen*.† In *Spencer's* case many differences were taken and agreed to *respecting express covenants, and covenants in law, and [*231 which of them ran with the land, and which were collateral, and did not go with the land: it is, therefore, sufficient to advert to those cases for the rules of law, and the distinctions on which they are founded. It is quite clear that a personal covenant cannot be assigned. It has been urged, that as the testator died possessed of the remainder of a mortgage term of a thousand years, the plaintiff might sue as his assignee; but we think there is no ground for saying he could do so, for on his death the remainder of the term vested in the plaintiff and his co-executor. The sum due to the testator from the defendant on the mortgage deed, was only bequeathed by the former to the plaintiff, no other interest was transferred to him. This, therefore, was merely a personal covenant, of which the executors alone could take advantage. The case in *Godbolt* is particularly applicable to show that this was a collateral covenant; it has also been well observed by my brother *Blosset*, that the covenant was broken in the life time of the testator; and the case of *Lewes v. Ridge*, Cro. Eliz. 863, determined that an assignee could not maintain an action on a breach of covenant before his own time.

We are, therefore, of opinion, that this action ought to have been brought in the name of the executors, by whom alone it could be maintained.

Rule absolute‡.

† *T. 25 Geo. 3, B. R. MSS. Sel. N. P.* 3d edit. 445.

‡ [See 5 *Maul & Selw.* 411, *Milnes et al. v. Branch.* 5 *Barn & Ald.* 1, *Vernon v. Smith.*]

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
EASTER TERM,
IN THE
FIFTY-EIGHTH YEAR OF THE REIGN OF GEORGE III, 1818.

FAULKNER v. EMMET.

[2 Moore 176. S. C.]

If *A.*, under arrest at the suit of *B.*, gives to *C.*, the sheriff's officer, in whose custody he is, a warrant of attorney for a debt due to *C.*, such warrant will be void, if no attorney be present at the execution on the part of *A.*

BEST, Serjt., had, on a former day obtained a rule *nisi* to set aside the warrant of attorney given in this case, and the execution issued thereon, and to discharge the defendant out of custody, on an affidavit stating that the defendant had been arrested at the suit of a third person, and was in custody of the plaintiff, as sheriff's officer at the time when the warrant of attorney was given; and that no attorney, on his part, was present at the time of its execution.

*Copley, Serjt., now showed cause, and stated that the defendant had
'234] been arrested, and brought to the plaintiff's house as a place of safety; that the defendant had been permitted by the plaintiff to go away out of custody to see his attorney; that the defendant had stayed away for three hours, and on his return voluntarily proposed to the plaintiff to give him a warrant of attorney for his own debt; and that such warrant had been executed without any solicitation on the part of the plaintiff. He contended, that the meaning

of the rules of court† was, that a sheriff's officer should not take a warrant of attorney in the cause in which he had the defendant in custody, and cited *Smith v. Burlton*, 1 East 241, where it was held, that a warrant of attorney given by a defendant in custody, at the suit of one creditor, to another creditor, was valid, although no attorney was present.

Best, Serjt., *contra*, urged that the defendant had been actually in the custody of the plaintiff; and that the alleged liberty for three hours could not alter the case; that the present question depended upon a rule of court different from that upon which *Smith v. Burlton* was decided, and that, therefore, the rule ought to be made absolute.

DALLAS, J. (After looking at the two rules of court) I admit that there is a distinction to be made between a *warrant of attorney given to a plaintiff at whose suit the defendant is in custody, and one given to a third person: [*235 in the first case, it may be extorted as the price of a release; but, in the last, as he is in custody at the suit of another, it will not procure his release. Still the question is, whether this warrant of attorney is not within the spirit of the rule; for an officer might exercise a great degree of undue influence, if he might extort this instrument. The words of the rule, in the generality of its terms, apply to this case; and it applies in principle and in reason. It was not sufficient that the defendant went to consult his attorney: he ought also to have induced his attorney to have returned with him. No case has been cited restricting the protection of this rule of court to a warrant of attorney given in the cause in which the defendant is in custody; but the case of *Waraker v. Gascoyne*, W. Bl. 1297, is stronger than this. There the defendant lodged at the officer's house, within the rules of the *Fleet*; and the court held, that it was next to being in close custody; for the officer, being surety to the warden, might deliver the defendant into close custody at any time. Therefore, I think this warrant of attorney should be set aside.

PARK, J., concurred.‡

Rule absolute.§

† *Easter*, 15 Car. 2., K. B. *Hil.* 14 & 15 Car. 2., C. P., by which it is ordered, "that no bailiff or sheriff's officer shall presume to exact or take from a defendant in custody, by arrest, any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant, who shall subscribe his name thereto, which warrant shall be produced when the judgment is acknowledged; and that, if any bailiff or sheriff's officer shall offend therein, he shall be severely punished.

‡ *Gibbs*, C. J., and *Burrough*, J., were absent.

§ [See *Newbury v. Emmett*, 2 Moore 175.]

*ELMSLIE v. WILDMAN.

[*236

[2 Moore 179. S. C.]

Where a verdict was found against a defendant, and a material witness for him arrived on the following day, the court refused to grant a rule for a new trial, because no application had been made to put off the first trial.

THIS was an action on a policy of insurance on goods, from *Jamaica*, to *London*. The ship, during her stay at *Jamaica*, had been so much exposed to the heat of the sun, that her timbers had shrunk, and, shortly after she sailed on her voyage, she leaked, though there had been no storm or other probable cause of injury. After pumping, the leak subsided, the ship made less water every day, and arrived at home in a sound state. The cargo, upon delivery, was found to be damaged. The question, at the trial, was, whether this loss arose from unseaworthiness or from the perils of the sea. The defendant called

no witnesses, but insisted, that he was entitled to a verdict on the plaintiff's case. The jury found for the plaintiff.

Vaughan, Serjt., now moved, that this verdict should be set aside, and a new trial granted, on the ground, that the captain, a material witness for the defendant, had arrived on the day after the trial, who made affidavit, that the ship leaked so much on the day after leaving *Jamaica*. that he bore up for *Port Antonio*, fearing he should founder, though the weather was fine, and there was no apparent cause of leaking.

GIBBS, C. J. In this case an action was brought against the defendant, in whose option it was to apply to put off the trial, from the absence of a witness, on the usual terms. That he has neglected to do, and it is fit, from justice to the plaintiff, to refuse the present application, because the defendant would have *237] an unfair advantage, in knowing what was the case intended *to be set up on the part of the plaintiff, and the evidence to be adduced in support of it. My brother *Vaughan* put the case on this ground, that the loss was occasioned, not by peril of the sea, nor by unseaworthiness, but by the seams of the vessel being opened by heat, when the vessel grounded in harbor, on the retiring of the tide. But she mended in the course of her homeward voyage, and arrived perfectly sound. Looking at the case with this view, I see no reason to rule this case differently.

The rest of the court concurring, the

Rule was refused.

FEATHERSTONHAUGH v. JOHNSTON.

[2 Moore 181. S. C.]

Where *A.* consigned the goods of *B.* to *C.*, and *C.*, without notice of the right of *B.*, sold a part, and kept the remainder in his possession: Held, that *C.* was liable in an action of trover by *B.* for the value of the goods that were sold, as well as for those that remained in his possession.

TROVER. At the trial of the cause before *Park*, J., at the sittings at *Guildhall* after the last term, it appeared, that the plaintiff agreed to send a cargo of bottles, by a ship of one *Humble*, from *Sunderland* to *London*. A dispute afterwards arose respecting the payment of freight and demurrage, whereupon the ship was ordered by *Humble* to sail, and the bottles were consigned by him to the defendant, who, without notice of any adverse claim, sold a part. Afterwards, the plaintiff informed the defendant that the bottles were his property, and demanded to have them delivered up to his disposal; to which the defendant answered, that the greater part had been already sold. It was contended at the trial, that the defendant was liable, in this action, only for the value of the part remaining unsold in his possession. The jury found a verdict for 717*l.*, being *238] *the value of the whole; but leave was given to move to reduce it to 347*l.*, the value of the part remaining unsold.

Hullock, Serjt., now moved accordingly, and insisted that, in order to make a demand and refusal evidence of a conversion, the party, when he refuses, must have it in his power to deliver up or to detain the article demanded; and he cited *Smith v. Young*, 1 Campb. 439, where, when a deed was demanded of a defendant, he refused to deliver it up, because it was in the hands of his attorney, who had a lien upon it; and Lord *Ellenborough* held, that that refusal was no evidence of a conversion, because the party, at the time he refused, had it not in his power to deliver up or detain the deed in question. Wherefore,

he contended that the defendant, in this case, was not liable beyond the value of the goods in his possession.

GIBBS, C. J. I agree to the proposition, that the demand and refusal in the case cited did not amount to a conversion. But it sometimes happens, that two points might be made in a case, and only one is made; and I cannot take the decision on that point as an authority to decide the other. In the present case, the defendant has been proved to have actually sold the goods in dispute, and a sale alone has been held, in many cases, to amount to a conversion. The principle of law is against the defendant, who has applied the goods to his own use. In the case of *Horwood v. Smith*, 2 Term Rep. 750, an action of trover was brought by the owner of goods against the defendant, who had sold them, and it appeared that the goods had been stolen, and sold in market *overt to the defendant; and afterwards, and before the conviction, notice was [*239 given to the defendant by the plaintiff, that the goods were his property; and, nevertheless, the defendant sold them. After conviction, the action was brought; and it was held, that the plaintiff could not recover, because the sale in market overt protected the goods until conviction; and, therefore, the defendant was not liable for a sale during the protection: but unquestionably, if the defendant there had sold, after protection had ceased, the action would have lain. Therefore, I think, there is no ground for the present motion.

DALLAS, J., BURROUGH, J., and PARK, J., concurred.

Rule refused.

After the decision of the case, *Hullock*, Serjt., admitted, that the case of *Jackson v. Anderson*, Ante, iv. 24, was also very strong against the defendant *M-Combie v. Davies*, (6 East, 538. 7 East, 5,) was also mentioned.

POPE v. BACKHOUSE.

[2 Moore 186. S. C.]

A farmer furnished the produce of his land to the poor of the parish of which he was churchwarden, at a fair market price: Held, that he was liable to penalties under the 55 Geo. 3. c. 137. s. 6.

DEBT upon the statute 55 Geo. 3. c. 137. s. 6, to recover certain penalties. The declaration stated, that the defendant being a churchwarden of the parish of *Cleobury Mortimer*, in the county of *Salop*, did, in his own name, provide, furnish, and supply, for his own *profit, certain goods for the support and maintenance of the poor of the said parish, against the form of the [*240 statute, &c. Plea, *nil debet*.

At the trial before *Burrough, J.*, at the last assizes at *Shrewsbury*, it appeared that the defendant was a farmer, and had supplied some of the poor of the parish of which he was churchwarden, with corn and flour; but the jury considering that they had been sold at a fair market price only, *Burrough, J.*, directed a verdict to be entered for the plaintiff, with liberty for the defendant to move to set it aside, and enter a verdict for himself, if such sale did not fall within the construction of the statute.

Best, Serjt., now moved accordingly, and contended, that, to bring this case within the statute, it was necessary for the jury to find that the defendant sold at a profit.

GIBBS, C. J. It is to be presumed, that a farmer does make a profit by selling the produce of his land at a fair market price. If an overseer, having purchased provisions at a certain price, should afterwards, in the event of a scarcity

which presses on the poor, let them have them at that price, he would not come within the act: but if he should sell them to the poor at the market price, and make a profit on them, he would be within the act. The defendant is certainly liable, and the verdict properly entered for the plaintiff.

The rest of the court concurred.

Rule refused.†

† [See 5 Barn. & Ald. 328, *West v. Andrews*. 3 Barn. & Ald. 145, *Proctor v. Manwaring*.]

*241] *DOE, on the demise of GREEN et al., v. BAKER.

[2 Moore 189. S. C.]

A. demised premises to B. for one year certain. It was agreed that after the expiration of that year the tenancy should expire on three months' notice being given by A. The agreement contained no clause of re-entry. B. entered and took receipts for the rent from A., first, in his own name alone, and afterwards in the names of himself and two others, who were his partners. After three years' possession, he received a notice to quit from A. alone: Held, that A. might recover on his own demise in an action of ejectment, the notice to quit from A. alone being sufficient to determine the tenancy.

EJECTMENT on two demises, the one by *Green* alone, the other by *Green* and two others. At the trial, before *Dallas, J.*, at *Westminster*, at the sittings after the last term, it appeared in evidence, that the plaintiff was a brewer, and the two other persons who joined in the second demise, were his partners; that the defendant was a publican, carrying on his trade in a house which belonged to the brewery; that he held the house under a written agreement, made with *Green* alone, for the term of one year, and that the agreement contained a proviso for determining the tenancy, after the expiration of the year, by *Green* giving to the defendant three months' notice to quit, but did not contain any clause of re-entry; that the defendant entered, and took receipts for rent from *Green*, at first in his own name alone, but, afterwards, in the name of himself and his two partners; that the defendant, after three years' possession, was served, by *Green* alone, with a notice to quit in three months. It was objected, at the trial, on the part of the defendant, first, that the receipts for rent being in the name of the three partners, and the possession changed, the notice to quit should have been given in their joint names; and, secondly, that, as the notice to quit given by *Green* alone, must be considered a nullity, and as no clause of re-entry was contained in the agreement, the present action could not be maintained. These objections were over-ruled by *Dallas, J.*, and the jury found a verdict for the plaintiff; but the *defendant obtained leave

*242] to move to set it aside, if the court should consider the objections well founded.

Onslow, Serjt., now moved accordingly, and urged the objections made at the trial.

GIBBS, C. J., (after recapitulating the objections and the evidence,) as to the first objection which has been made, the circumstance of the receipts for rent for a certain period having been given by the partners, does not prove the legal estate to have been in them; and as there is no evidence of a transfer, the plaintiff is entitled to recover on his sole demise. As to the second objection, a clause of re-entry was wholly unnecessary. The agreement stipulated for the determination of the tenancy, upon certain terms agreed upon between the parties at the time of its execution, viz. the one party giving the other three

months notice to quit. Upon the expiration of the three months after the notice to quit had been served, the tenancy expired, and *Green* became entitled to maintain this action.

The rest of the court concurred.

Rule refused.

ANDERSON v. HAYMAN.

[2 Moore 192. S. C.]

The defendant was arrested upon a *capias* directed to the sheriffs of *London*, which issued upon an office copy of an affidavit of debt sworn before the filacer for *Devon*, no affidavit having been made before the filacer for *London*: Held, that the proceedings were regular, and the defendant not entitled to his discharge.

A *CAPIAS ad respondendum* directed to the sheriff of *Devon* was issued against the defendant, on an affidavit of debt sworn by the plaintiff before the filacer *for *Devon*. The defendant not being found there, an office [*243 copy of that affidavit was filed with the filacer for *London*, and on that office copy, a *capias ad respondendum* issued, directed to the sheriffs of *London*, but the defendant not being found, a *capias by continuance* was issued, directed to the same sheriffs, upon which he was arrested. No affidavit of debt had been made before the filacer for *London*.

Copley, Serjt., having on a former day obtained a rule *nisi*, to have the bail bond delivered up to be cancelled, and the defendant discharged upon entering a common appearance,

Bosanquet, Serjt., now showed cause. In *Boyd v. Durand*, Ante, ii. 161, it was decided, that if a plaintiff proceed by a second original *capias*, instead of a *testatum capias*, a second affidavit to hold to bail is not necessary, and *Lawrence*, J., there says, "as to the practice regarding the issuing of a *testatum capias*, the act of parliament does not say, that more than one affidavit shall be made; and the practice has prevailed, of sending a copy to the filacer of another county, who thereupon makes out a *capias*." And accordingly it is stated in *Impey's Practice*, "if the defendant cannot be found in the county where the first *capias* issued, the plaintiff's attorney, on taking an office copy of the affidavit, marked by the filacer for the county where the first writ issued, may make out a *capias* into another county."

Copley, Serjt., in support of his rule, urged that *Lawrence*, J., in *Boyd v. Durand*, relied on the accidental circumstance of the same person being filacer for both counties; and he cited *Dalton v. Barnes*, (1 Maule & Selwyn, 230,) in which *case it was contended, that the practice was for the filacer, [*244 upon transmitting to him either the original affidavit, or an office copy of it to issue his writ. But the court said, that such could not be the practice, for that an affidavit made for one specific object, could not be transferred to another, and perjury could not be assigned on the office copy. The proceedings in this case having been altogether irregular, the defendant was entitled to his discharge.

The court held the practice, as stated in *Boyd v. Durand*, to be perfectly regular, and the rule was accordingly

Discharged.

SCILLY, Demandant; SMITH, Tenant; BARNARD, Vouchee.

Recovery amended by inserting the additional names of the parishes, where the names in the deed and the recovery differed.

BLOSSET, Serjt., moved to amend this recovery suffered in *Trinity* term, 10 *Geo. 3.*, by inserting the additional names of the parishes of *Layer & Wigborough*. In the recovery, they were named *Layer & Wigborough*; but in the deed to lead the uses they were called *Layer Marney* and *Much Wigborough*. The possession had followed the deeds.

Fiat.

*245]

*(IN THE EXCHEQUER CHAMBER.)

(In Error.)

JAMES v. EMERY and CLUDDE.

[2 Moore. 195. S. C.]

If the Interest of covenantees be several, they may maintain several actions, although the language of the covenant be that of a joint covenant. Interest allowed on the affirmance of a judgment, in an action for breach of covenant for non-payment of purchase-money, on the whole sum recovered below, and from the date of the judgment below, notwithstanding an express agreement between the parties that part only of the sum recovered should bear interest.

THE defendants in error had brought an action of covenant against the plaintiff in error. The declaration stated, that, by certain articles of agreement, dated the 27th of *January*, 1812, and made between *Benjamin Rowley, Emery, & Cludde*, of the one part, and *James and R. J. Stubbs*, (since deceased) of the other part, (reciting that *Rowley, Emery, & Cludde*, together with one *Sarah Dunning*, were entitled in fee simple to the entirety of the premises in the proportions following; that is to say, *Rowley*, to five undivided twelfth parts and one moiety of a twelfth part, *Emery & Cludde*, to five undivided twelfth parts and one moiety of a twelfth part, and *Sarah Dunning*, to the remaining twelfth part;) *Rowley, Emery, & Cludde* did, for themselves severally, and not jointly, and for their several and respective, and not joint heirs, executors, and administrators, covenant with *James & Stubbs*, and each of them, their and each of their executors, administrators, and assigns, that they, *Rowley, Emery, & Cludde*, would, within two months from the date thereof, make out and deliver to *James & Stubbs*, an abstract of the title of them, *Rowley, Emery, & Cludde*, to eleven undivided twelfth parts of the premises, and would, within three months from the date thereof, in conjunction with all other parties in anywise interested therein, grant, release, and convey unto and to the use of *James & Stubbs*, their heirs, and assigns, as tenants *in common,

*246] the said eleven parts, &c.; in consideration whereof, *James & Stubbs*, did thereby, for themselves and their respective heirs, executors, administrators, and assigns, covenant with *Rowley, Emery, & Cludde*, and each of them, their and each of their executors, administrators, and assigns, that they, *James & Stubbs*, their heirs, executors, administrators, or assigns, would pay to *Rowley*,

Emery, & Cludde, their executors, administrators, or assigns, (in the proportions of one moiety to *Rowley*, and the other moiety to *Emery, & Cludde*.) the sum of 14,000*l.* by the following instalments, *viz.* 2000*l.* on the 25th of *December*, 1813, with interest from the 25th of *December*, then last, 2000*l.* on the 25th of *December*, then next following, and 2000*l.* on every succeeding 25th of *December*, until the whole sum of 14,000*l.* should be paid, but without demanding or requiring any interest for any or either of such payments to be made after the said 25th of *December*, 1813; and would also make and execute to *Rowley, Emery, & Cludde*, their heirs, executors, administrators, and assigns, such a security upon the premises, by way of mortgage, for payment of the several instalments as *Rowley, Emery, & Cludde*, or their counsel, should direct; and, as a collateral security, would make and give the joint and separate bond of them, *James & Stubbs*, in a proper penalty. Averment of performance, and readiness to perform, on the part of the plaintiffs (below,) and that the defendant (below) had taken possession of the premises. Breach, refusal on the part of *James & Stubbs*, to accept a conveyance, and to pay such proportion of the purchase-money as was then due. Plea, *actio non*, for that *Rowley*, was still living. General demurrer and joinder. Judgment for the plaintiffs below for 3100*l.* and 38*l.* costs. Assignment of general errors and joinder:

**Gaselee*, in support of the assignment of errors, submitted, that the question for the opinion of the court was, whether the covenant, which [*247] was the foundation of this action, was not a joint covenant, and whether *Rowley*, should not have joined in this action. He contended, that, although it might be said, that the interest of the vendors was separate, yet, as to the purchasers, the covenant was joint. They covenanted, for payment of the purchase-money, to execute a mortgage, and to give a bond, as a further security for payment of the purchase-money. Now, if these covenants should be held to be separate, the plaintiff in error would be liable to separate actions, by each of the defendants, for breach of each of the covenants; yet the interest of the covenantees must be considered as joint: the court will not presume that different remedies were given, namely, that the plaintiffs in error should be subject to separate actions for not paying the purchase-money, when they are to be subject to joint actions only for not executing the mortgage and not giving the bond. A covenant with them and each of them (from *Slingsby's* case, 5 Rep. 18. b., down to the present time,) does not make a several covenant. A covenant with two persons for the benefit of one of them only, is joint and survives, though one of them would recover merely as trustee. So, here, *Rowley, Emery, & Cludde*, had a joint legal interest in the covenant to enforce three things, the payment of the purchase-money, the execution of the mortgage, and of the bond; the purchase-money, when recovered, to be divided into separate parts. In *Anderson v. Martindale*, 1 East, 497, it was held, that a covenant with *A.* and *B.* to pay an annuity to *A.*, was a joint covenant, although for the benefit of *A.* only. This case is stronger, for, of the things covenanted to be done, two are [*248] in their nature joint. *Southcote v. Hoare*, Ante, iii. 87, is still more favorable to the plaintiffs in error; and, on the authority of these two cases, it appears, that this is a joint covenant, and that *Rowley, Emery, & Cludde*, are to pay the money jointly, otherwise it must be held, that the executors of one could have maintained an action for the purchase-money, and then, in whose name ought the action for not executing the mortgage and bond to be brought?

Puller, *contra*, was stopped by the court.

GIBBS, C. J. The only question for the opinion of the court is, whether this action has been properly brought by the plaintiffs below, without joining *Rowley*. The principle is well known, and fully established, that if the interest be joint, the action must be joint, although the words of the covenant be several; and if the interest be several, the covenant will be several, although the terms of it be joint. *Eccleston v. Clipsham*, 1 Saund. 153. In this case the interest is several, and the covenant must follow the interest of the covenantees. But it

has been said, that there are other covenants which stipulate for securities which are joint, and that, consequently, this covenant must be joint. That by no means follows; this covenant may be several, and those joint. Two cases have been cited, but they have been decided on exceptions to the rule I have laid down, and leave this case within it. In neither of those cases had the person who, it was contended, was a necessary party to the action, any beneficial interest whatever. Here, the parties were all beneficially interested, and their *249] interests were clearly several; therefore *the covenant also is several, and the action for the proportion of each may be brought severally. Upon these grounds, we are clearly of opinion, that the judgment must be affirmed.

Judgment affirmed.†

Puller, then moved for interest on the whole sum recovered, from the time of the allowance of the writ of error, although it was larger than that on which interest had been agreed to be paid; as, by the terms of the agreement, interest was payable on the first instalment only.

Gaselee, contended, that such interest only as would have been recovered below, was allowable now.

GIBBS, C. J. It is true, that no interest is payable on the last instalments, but that is, provided they are paid on certain days. It is a rule of this court, whenever money is to be paid on a certain day, if it be not paid on that day, to allow interest. If it be a sale of goods, to be paid for on a certain day, and they are not paid for, it is within the principle, and interest will be allowed from that day. On the same principle it is that a bill of exchange bears interest; otherwise, the party, by not having the money paid when due, would lose the benefit of the interest. The court is of opinion, that interest should be given from the day of the judgment below.

Interest allowed accordingly.

† [See *Mr. Metcalf's* note to the case of *Rolls v. Yate*, Yelv. 177, and the American cases there cited. See also Cary's Rep. 20, (edition of 1820.) and the Year Book 2 Edw. 4. 2.]

*250]

*(IN THE EXCHEQUER CHAMBER.)

(In Error.)

IKIN v. BRADLEY.

[2 Moore. 206. S. C.]

Interest allowed, on affirmance of a judgment, for the balance due from a banker on account of money deposited with him (it being the custom of the bank to allow interest,, but at the rate only which the bank were accustomed to allow.

ASSUMPSIT, to recover a balance due to the defendant in error, on account of money deposited with bankers, of whom the plaintiff in error was the surviving partner.

Littledale moved for interest, on the affirmance of the judgment, on an affidavit, which stated that it was the usage of the bank to allow their customers interest on money so deposited. He cited *Hammel v. Abel*, Ante, iv. 298, and *Gwyn v. Godby*, Ante, iv. 346.

And, it being the custom of the bank to allow such interest, at the rate of 4l. per cent. per annum, the court ordered it to be calculated at that rate.

LLOYD v. SANDILANDS.

[2 Moore 207. S. C.]

A sheriff's officer, in execution of meane process, peaceably obtained entrance by the outer door of the house, and followed the defendant to his bed-room, who locked himself therein, and refused to open the door, though informed by the officer of his business. The officer then waited in the garden at the back of the house all night, and in the morning touched the defendant through a broken pane of glass, requiring him to surrender, and then entered the room in which the defendant was, through the window, which the officer in entering further broke, and arrested the defendant: Held, that the officer was justified.

COPLEY, Serjt., had obtained a rule nisi to discharge the defendant out of the custody of the sheriff of *Middlesex*, upon his affidavit, which stated, that he was *arrested on the 4th of *April* in his bed-room, at the house of a [251 friend, with whom he had for some time resided. That the officer, to effect the arrest, got on a shed in the garden, and broke a window, and having entered through the aperture, showed the defendant his warrant, and took him to a lockup house; that the officer rushed though the house into the garden, when the outer door was first opened in the morning, and then got upon the shed and made the arrest, as before stated, and that he believed that these proceedings took place without the knowledge of his friend.

Best and *Onslow*, Serjts., now showed cause, on the affidavit of the officer, which stated, that he had a warrant from the sheriff of *Middlesex* to arrest the defendant, and hearing that he secreted himself in the house of his friend, the officer called there, and told the servants he had a warrant, but was refused admittance; that on the evening of the 3d of *April* he went with two assistants, and obtained admittance peaceably, when the defendant rushed up stairs to his bed-room and fastened the door; that the officer followed him, and asked him to open the door, which he refused to do, and made his escape through a window, in a room adjoining the bed-room; that the officer and his assistants watched all night in the garden, and on the next morning got peaceably into the house again, and one of the assistants watched the bed-room door of the defendant, who had returned there, while the officer went to the back of the house, and having ascended the roof of a shed, he saw the defendant in the room, and through a broken pane of glass touched the defendant, and required him to surrender, which he refused; that the officer then broke the remaining part of the pane of glass, and entering into the room, arrested the defendant. The officer and *his assistants also swore, that the outer door of the [252 house was open at the time of their admittance. It was urged that the arrest was legal, as the officer, having gained admittance in a peaceable manner, through the outer door of the house, was justified in forcing his way into the bed-room of the defendant.

Copley and *Vaughan*, Serjts., in support of the rule, contended, that the officer had no right to force his way into the private apartments of the defend-

ant, who could be considered but as a lodger; that the officer having entered the outer door, and passed through the house into the garden, the forcing of his way through the window must be considered a re-entry; and that if this were held to be a legal arrest, it would be to rule, that if an officer once gets past the outer door of a house, he may quit it, and place a ladder at every window, for the purpose of re-entering when he pleases.

DALLAS, J. The officer and his assistants have sworn that the outer door of the house was open at the time of their admittance; this case then must be governed by *Lee v. Gansell*, 1 Cowp. 1, where it was held, that a bailiff in execution of mesne process may break open the door of a lodger's apartment, having first gained peaceable entrance at the outer door of the house. I cannot distinguish between breaking open the inner door of a house, and breaking open a window after the outer door is open. The principle, that every man's house is his castle depends on this, that if the outer door be broken, it lays the house open to the invasion of all sorts of persons, but where the inner door is broken that is not the case.

PARK, J., concurred.

*BURROUGH, J. I hold it to be clear law, that when the outer door *253] is open, the bailiff may enter forcibly, either through an inner door or a window. If it were otherwise, it would only be necessary for a person to frame one room with iron or stone, or other material, that would resist all external force, and then all process of the law would be set at defiance.

Rule discharged.†

† Gibbs, C. J., was absent.

BARATTA v. LEE.

[2 Moore 214. S. C.]

A notice by mistake to a defendant to appear on a day which has past is an irregularity, for which the court will set aside the proceedings.

VAUGHAN, Serjt., had, on a former day, obtained a rule *nisi*, to set aside the service of a writ of *capias ad respondendum*, for irregularity, with costs, upon the ground that the writ which issued the 14th of *March*, was returnable in fifteen days of *Easter*, which fell on the 5th of *April*; but in the notice to appear, the defendant was required to appear at the return of the writ, being the 5th of *February*.

Copley, Serjt., now showed cause, and contended, that the defendant could not have been misled by the mistake of the 5th of *February* being inserted in the notice, instead of the 5th of *April*, as the 5th of *February* was past, and he must have known it was intended for the 5th of *April*. He cited *Steel v. Campbell*, Ante, i. 424, to show that this was not an irregularity for which the court would set aside the proceedings.

*Vaughan, in support of the rule, cited *Pinero v. Hudson*, 1 Maule *254] & Selw. 119, and *Grojan v. Lee*, Ante, v. 651. 1 Marsh. 272, to show, that even the circumstance of the day and year being in figures and not in words at length, was irregular. Here the defendant was required to appear at a past day, which was impossible, and could not but be held to be irregular.

DALLAS, J. It is necessary that the party should be informed on what day he is to appear. This notice does not give the defendant that information, and was clearly irregular.

The rest of the court concurred.

Rule absolute.†

† *Gibbs*, C. J., was absent.

GIBBON v. YOUNG.

[2 Moore 224. S. C.]

By charter-party the defendant covenanted to pay freight for a cargo, at a certain rate *per ton, freight measurement*. To an action of covenant for non-payment of freight, he pleaded, *first*, that by the usage of the particular trade an account must be produced to the freighter by the owner, before he could demand payment of the freight, and that no such account was delivered; and, *secondly*, that it was the duty of the plaintiff to deliver a freight measurement, and that he had not done so: Held, on demurrer, that these pleas were bad, as the usage so pleaded would create a new condition, and vary the terms of the original contract.

COVENANT. The declaration stated, that by a charter-party, dated the 1st of *April*, 1816, and made between the plaintiff, as owner of a certain ship then lying at *Aberdeen*, and bound for *Cork*, of the one part, and the defendant, the freighter of the ship, of the other part, it was witnessed that the plaintiff, for the considerations thereafter mentioned, reserving to himself the *liberty of loading the said ship at *Cork*, with a cargo for *Barbadoes*, on ship's account, did covenant with the defendant, that the commander or some other proper person should with all convenient speed set sail, and proceed direct for *Cork*, thence for *Barbadoes*, and thence for the *Bay of Honduras*, with liberty to call at *Kingston, Jamaica*, on her way to *Honduras*, and there to load such goods as might offer for *Honduras*, on freight on ship's account, and that on the ship's arrival at *Honduras*, the commander should take on board from the agents of the defendant, a full and complete cargo of mahogany, together with a sufficient quantity of dye-wood to fill up the broken stowage, and should immediately set sail therewith, and proceed to *Norfolk*, in the state of *Virginia*, and there make a true delivery of the cargo in the usual and customary manner, and agreeably to bills of lading, which the commander should sign for the same; and thereupon, the commander should receive on board there from the agents of the defendant, a full and complete cargo of lumber or other goods, and should proceed therewith, direct to the bay of *Honduras*, and there make a right and true delivery of the cargo, freight free, and agreeably to bills of lading; and should then take on board from the agents of the defendant, a full and complete cargo of mahogany, together with a sufficient quantity of dye-wood to fill up the broken stowage, and should immediately set sail therewith, and proceed to the port of *London*, and there make a right and true delivery of the cargo agreeably to bills of lading, and then end the said voyage; and that, in consideration thereof, the defendant did covenant with the plaintiff, that the defendant would well and truly pay, or cause to be paid to the plaintiff, freight for the two cargoes of mahogany and dye-wood, in the following manner, namely, for the first cargo to be discharged at *Norfolk*, at the rate *of 3*l.* 8*s.* sterling *per ton*, of four hundred and eighty superficial feet [²⁵⁶ *freight measurement*, and for dye-wood, at the rate of 1*l.* 14*s.* *per ton* of 20

cwt., together with 2s. 6d. per thousand feet mahogany, and 1s. per ton of dye-wood for primage, and also 1s. 6d. per ton upon the whole of the cargo for port charges; such freight, primage, and port charges to be paid upon a right and true delivery of the said cargo, by approved bills of exchange on *London*, payable at ninety days' sight, and for the second cargo to be discharged in the port of *London*, at the rate of 5l. per like ton, of four hundred and eighty superficial feet of mahogany, and 2l. 10s. per like ton, 20 cwt., of dye-wood at the king's beam, together with the same allowances, as therein before mentioned, for primage and port charges; the said last mentioned freight, and primage, and port charges to be paid in manner following, namely, one full and equal third part thereof, on a right and true delivery of the said cargo, and the remainder by approved bills of exchange, payable three months after that period. The plaintiff then averred, that the ship did sail direct for *Cork*, thence for *Barbadoes*, and thence for the bay of *Honduras*, and arrived there on the 4th of *August*, and that the commander received from the agents of the defendant, a full and complete cargo of mahogany, together with a sufficient quantity of dye-wood to fill up the broken stowage, and set sail therewith for *Norfolk*, and arrived there on the 28th of *November*, and did there make a right and true delivery of the same cargo, in the usual and customary manner, and agreeably to bills of lading which the commander had signed for the same. And that upon such delivery, the sum of 697l. 5s. 9d., being at the rate of 3l. 8s. sterling per ton, of four hundred and eighty superficial feet freight measurement, for each ton of the cargo of mahogany, so laden and delivered at the rate of 1l. 14s. per ton, for *257] each ton of 20 cwt. of the dye-wood, so *laden on board the said ship and delivered, became due and payable from the defendant to the plaintiff, and also the further sum of 12l. 18s. 8d., being 2s. 6d. per thousand feet of mahogany, and 1s. per ton of dye-wood for primage; and also the further sum of 16l. 11s. 3d., being 1s. 6d. per ton upon the whole of the said cargo for port charges, which several sums amounted to the sum of 726l. 15s. 8d. The plaintiff then averred performance on his part, and assigned for breach, non-payment by the defendant of the sum of 726l. 15s. 8d., on such right and true delivery of the first cargo. First plea, *non est factum*. Second plea, that it was the constant and established course and usage of commerce with *Honduras*, and the custom between the owners and masters of ships or vessels, and the freighters thereof under charter-parties upon freight, payable according to freight measurement, or at, and after any certain rate by the ton, reckoned according to freight measurement, that the owner or master, or his agent or agents in that behalf, receiving a cargo of mahogany or other wood at *Honduras*, on board any ship or vessel to be carried from thence upon freight payable as before mentioned, to make or cause to be made, for ascertaining the amount of such freight, a measurement of such mahogany or other wood called a freight measurement, and to produce and show to the freighter or his agent, on account of the freight payable for the same, according to such measurement, before payment is made of the freight of such mahogany or other wood. And, that although the commander of the ship did take on board in the bay of *Honduras*, such cargo as in the declaration is mentioned, and did proceed therewith to *Norfolk*, and make a right and true delivery thereof, as in the declaration is also mentioned; and although the defendant had always since the delivery thereof been *258] *ready and willing, and still was ready and willing, upon a freight measurement of the mahogany comprised in the cargo being made, and an account of the freight payable for the same, according to such measurement being produced and shown to him, to pay the freight thereof, at, and after the rate in the charter-party mentioned by approved bill or bills of exchange on *London* aforesaid, payable at ninety days' sight, according to the form and effect of the charter-party; yet, that the plaintiff did not, nor would at any time before the commencement of this suit, nor did, nor would the master of the said ship make, or cause to be made, a freight measurement of such mahogany,

or any part thereof, and produce or show, or cause to be produced or shown to the said defendant or his agent in that behalf, an account of the freight payable for the same, according to such measurement; but, on the contrary, had hitherto wholly refused and neglected so to do, whereby the defendant had been prevented from well and truly paying, or causing to be paid to the plaintiff, freight for the mahogany by approved bill or bills of exchange on *London*, payable at ninety days' sight, according to the form and effect of the charter-party. Third plea, that although the commander of the ship did make a right and true delivery of the cargo of mahogany, together with the dye-wood at *Norfolk* aforesaid as in the declaration mentioned, and although the defendant had always, since the delivery thereof, hitherto been ready and willing, and still was ready and willing, upon having an account of the freight measurement of such mahogany, produced and shown to him by the plaintiff or his agent, to pay the freight thereof, at, and after the rate in the charter-party mentioned, by approved bill or bills of exchange on *London*, payable at ninety days' sight, *according to the form and effect of the charter-party; and although it was the duty of the plaintiff or his agent, to have produced and shown to the defendant or his agent, in that behalf, a freight measurement thereof, for the purpose of ascertaining the amount of the freight payable for the same, yet, that the plaintiff did not, nor did any agent for him at any time before the commencement of the suit, produce and show, or cause to be produced and shown to the defendant, or his agent, an account of the freight measurement of such mahogany, or any part thereof, or give them, or either of them, notice of the amount of freight payable for the same, according to such freight measurement; but that the plaintiff had wholly neglected and refused so to do, whereby the defendant had been prevented from well and truly paying, or causing to be paid to the plaintiff, freight for the mahogany by approved bill or bills of exchange on *London*, payable at ninety days' sight, according to the form of the charter-party. [*259]

To the second and third pleas the plaintiff demurred, and the cause came on for argument this day.

Best, Serjt., for the plaintiff, contended, that these pleas were bad. The plaintiff stipulated to make a true delivery of the cargoes, and the defendant, by his pleas, has admitted that such delivery was made; but he has insisted that the plaintiff was bound, by the custom at *Honduras*, to make out an account of the freight admeasurement. Such custom may exist at *Honduras*; but to state that is not an answer to the declaration. The deed upon which this action is brought is alone to be considered, and the parties cannot introduce a custom varying the nature of the contract thereby made; *Yates v. Pym*, (Ante, vi. 446. 2 Marsh. 141,) is expressly in point; a custom cannot subject the parties to a new obligation, but can only be resorted to to explain a written instrument, in case of ambiguity. By the covenants in this deed, the plaintiff was bound to deliver the cargoes, and having done so his liability has ceased. But giving the utmost effect to this covenant, and supposing this to be not a mere usage but a positive covenant, it is not a condition precedent. In *Boone v. Eyre*, 1 H. Bl. 273, it is said, that "where mutual covenants go to the whole of the consideration, on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a part, as where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." *Havelock v. Geddes*, 10 East, 555, is a strong authority also in favor of the plaintiff. No injury has, in this case, been done to the defendant, and he cannot set up the usage as he has attempted to do, as a defence to this action. [*260]

Lens, Serjt., for the defendant. This is not a question as to a condition precedent, or a forfeiture of freight. The question is, whether, by the terms of the charter-party, the plaintiff can require the defendant to give bills for the freight before the measurement is ascertained. To ascertain the amount of the freight, it is necessary that the plaintiff should take a certain step, according to the

known usage of the trade ; and, certainly, until that step be taken, the amount due for the freight cannot be ascertained. The plaintiff complains of the defendant for not giving bills of exchange, when the plaintiff himself will not furnish the means of ascertaining what the amount of the bills is to be. It is only necessary to read the contract. *Havelock v. Geddes* and *Boone v. Eyre* are not relevant. If the giving the account of the freight measurement be a condition precedent, *it must be complied with; it cannot be a breach of covenant in the defendant to omit giving bills, the amount of which, they, whose duty it is to do so, have not ascertained. The contract does not show who was to do this act, it depends on the usage. The plaintiff, by his demurrer, has admitted the usage ; and whether the admeasurement is to be made by him or the defendant, until such admeasurement be made, the defendant cannot be called upon to give bills for the payment of the freight.

Best, Serjt., in reply, was stopped by the court.

GIBBS, C. J. This usage does not appear to be unreasonable, and, as pleaded, would amount to a condition precedent ; for no freight would be payable until delivery of an account of the measurement of the cargo : but the pleas are insufficient in law. If a stipulation to the same effect were in the charter-party, there would then also be a condition precedent. In this case that question does not arise ; the point is, whether the defendant can now avail himself of this usage. The terms of a mercantile contract certainly may be ascertained by usage ; but it is perfectly clear, that new terms cannot be introduced into any written instrument under seal. On trial, the usage, as evidence to explain the nature of the contract, would be admissible, and the jury would decide whether it is a good usage ; but, as now pleaded by the defendant, it adds to the stipulations of the charter-party, and leaves the question, of what the actual measurement agreed upon was, in the same obscurity as before. It also introduces a new stipulation ; that the plaintiff was bound to do more than deliver the cargo, viz., to give in a written account of the freight measurement. This is a new term, and cannot be introduced in the pleas of the defendant.

*262] *DALLAS, J.* I am of the same opinion. It has been long established, that mercantile instruments are to be construed according to the usage and custom of merchants. The words "freight measurement" have no definite meaning, they are clearly words of mercantile dealing ; evidence might, therefore, be admitted on trial, to show what "freight measurement" is, and the validity of the usage might be there ascertained. But by the course which the defendant has taken, he has added a new condition to the original contract ; and I, therefore, consider that the plaintiff is entitled to judgment.

PARK, J., and *BURROUGH, J.*, concurred.

Judgment for the plaintiff.

SYKES, demandant ; KNOWLES, tenant ; Lord GALWAY, vouchee.

Recovery amended by adding the name of a parish, (the name having been improperly spelled.) on affidavit that the vouchee was seised of land in the parish proposed to be substituted, and that it was intended to suffer a recovery of all the vouchee's lands in the county in which the proposed parish was situate ; but the court would not allow the name originally inserted to be expunged, as the affidavit did not state that there was no such parish, or that the vouchee had no lands in such parish.

HEYWOOD, Serjt., moved to amend this recovery, by substituting the parish of *Royston* for the parish of *Rayston*, on an affidavit of the steward of *Lord Galway*, which stated, that *Lord Galway* was then seised of land in *Royston* for life, with remainder to his son in tail, and on the affidavit of the agent in

town, which stated that he was instructed to suffer a recovery of all Lord *Galway's* lands.

The court permitted him to amend, by inserting the parish of *Royston*; but as the affidavits did not state that there was no such parish as *Royston*, or that Lord *Galway* had not lands in *Royston*, they directed that *Royston* should not be expunged.

Fiat.

*ALLEN, assignee of PRIOR, a bankrupt, v. IMPETT et al. [263

[2 Moore. 240. S. C.]

The trustees under a marriage settlement of stock, the dividends of which they covenanted to permit the bankrupt to receive for his life, executed, after his bankruptcy, a power of attorney to A. to receive the same. A. received the dividends, and paid them over to the wife of the bankrupt, save one sum, which he paid to one of the trustees: Held, that the assignees might recover the amount of such dividends from the trustees, in an action for money had and received.

ASSUMPSIT for money had and received. At the trial, before *Dallas, J.*, at the *London* sittings after the last term, it appeared, that the defendants were trustees of the marriage settlement of the bankrupt, and that certain stock thereby settled was held by them, upon trust, to pay the dividends to the bankrupt during his life; that he had been permitted by the defendants to receive these dividends, until the issuing of the commission against him, which happened in *December, 1815*; that in *August, 1816*, the defendants executed a power of attorney to a third party to receive the dividends, who, accordingly, received two half-years' dividends, due in *April* and *October, 1816*, and paid them over to the wife of the bankrupt, and also received another half-years' dividend, due in *April, 1817*, which he paid over to one of the defendants. The present action was brought to recover the total amount of these dividends. *Dallas, J.*, being of opinion that the defendants were liable in equity only, and that the action was not maintainable, directed a nonsuit.

Copley, Serjt., had obtained a rule *nisi* in the last term, to set aside the nonsuit, and enter a verdict for the plaintiff for the whole sum sought to be recovered. He cited *Moses v. Macferlan*, 2 Burr. 1005. S. C. 1 W. Bl. 219.

Blosset, Serjt., now showed cause, and contended, that the action could not be maintained, as the plaintiff had *no legal right to the money, but had [264 merely an equitable interest; and that, at all events, as the obligation arose from a deed, such deed should have been declared upon. In support of the first objection, he cited *Co. Litt. 272. b.*, *Chudleigh's* case, 1 Rep. 121. b., *Foorde v. Hoskins*, 2 Bulst. 336: and, in support of the second, *Atty v. Parish*, 1 N. R. 104.

Copley, Serjt., in support of the rule, contended, that as the trustees had given an authority to receive the dividends, under which they were actually received, there was nothing in the objections which had been urged to affect the plaintiff's right to recover.

Per curiam. This action is brought to recover the amount of dividends of stock to which the bankrupt was entitled, and which his trustees have received since the bankruptcy, and applied to various purposes. With full notice of the bankruptcy, they refuse to pay the money over to the assignees. There cannot be any difficulty in sustaining this action, the whole of the money having been virtually received by the trustees.

Rule absolute.†

† *Gibbs, C. J.*, was absent.

WILLS, assignee of HAYES, a bankrupt, v. WELLS.

[2 Moore 247. S. C.]

The bankrupt assigned a policy of assurance to the defendant; the company, however, considering it invalid, paid to the defendant half of the sum insured as a gratuity, on his giving up the policy. In an action of trover by the assignee of the bankrupt to recover the value of the policy, held, that the value of the parchment only, and not the sum gratuitously paid, was recoverable.

TROVER. The action was brought to recover the value of a policy of insurance, effected by the bankrupt, on the life of one *Luteward*, for 3000*l.* At the *trial, before *Burrough*, J., at the *London* sittings after last *265] *Michaelmas* term, it appeared, that the bankrupt being indebted to the defendant, had assigned the policy to him, and the secretary to the insurance office proved, that the sum of 697*l.* 15*s.* was paid by the office to the bankrupt, in the presence of the defendant, and the policy thereupon cancelled; that the money was paid merely as a gift or gratuity to the party, and not as a sum which was due on the policy as a valid instrument, for the life was not insurable at the time it was effected; that the board had determined that they were not compellable to pay upon the policy, and that the bankrupt and defendant had admitted that they had no claim upon the office. It was proved, by the bankrupt, that the defendant had received the money, and took it up from the table at the office; that the life was accepted at the office on the usual certificates; and that, at the time of effecting the insurance, he thought the life insurable; but, from subsequent information, he did not believe that it was. *Burrough*, J., was of opinion, that as the policy was cancelled, and must be considered as waste parchment, and as the money was paid before the action was commenced, merely as a gratuity, and not under any idea of a compromise, the case must be governed by *Boyter v. Dodsworth*, 6 T. R. 681, and that the plaintiff could recover nothing more than the value of the parchment. A verdict was accordingly entered for 2*d.*, the value of the parchment, with liberty to move to increase it to the sum received by the defendant.

Best, Serjt., in the last term, had obtained a rule *nisi* to increase the verdict; and leave was given to the defendant, on showing cause, to move to enter a nonsuit.

*266] *Vaughan*, Serjt., now showed cause against the rule for increasing the verdict, and also moved to enter a nonsuit. He contended, that, as this was an action of trover and not of *assumpsit*, for money had and received, the plaintiff must prove himself to have a property in the policy, and that the policy, at the time of the supposed conversion, was of some value. The bankrupt and the defendant being fully convinced that they had no legal claim against the office, threw themselves on the mercy of the directors, who consented to give the sum in question as a gratuity. The policy was of no value; it was not used by the defendant; he could enforce no payment under it, and the sum he received was a mere gift. If the money had been paid as being due under the policy, the plaintiff might have succeeded in an action for money had and received; but the whole of the evidence negatived such payment. The verdict for the parchment could not be retained, for it was of no value. *De minimis non curat lex*.

Best, Serjt., *contra*. The actual value of the policy was, at least, the money received by the defendant; the money was paid to the person who produced the policy at the office, and would not have been paid without such production. Besides, it does not appear that an action might not have been maintained on the policy against the office, although the bankrupt and the defendant thought otherwise. This case is distinguishable from *Boyter v. Dodsworth*. The sums received by the sexton were merely proportionable to his civility; he had no

right to them, and, therefore, could not recover. Here the plaintiff becomes entitled to all the bankrupt's property, and with it to this policy; and whatever sum has been received by means of it is the measure of damages the plaintiff ought to recover. He might, indeed, if in possession of the policy, have recovered the *full amount; but, at all events, he is entitled to what has been received. As to the parchment, on the authority of *The King v. Aslett*, 1 N. R. 1, the plaintiff is entitled to recover the value of it. [*267]

DALLAS, J. In this case, there is clear evidence of a conversion, and I am of opinion, that the plaintiff is entitled to retain the verdict which the jury have found; the only question, therefore, is, whether the verdict is to be increased. The evidence is decisive, that the payment was merely gratuitous, and that the policy was known to the parties to be invalid; and being a mere voluntary and gratuitous payment, this case is brought within the principle upon which *Boyter v. Dodsworth* was decided, and the plaintiff cannot recover. It is to be remarked, that this is a payment of a part only of the sum insured, and if the assignee is entitled to recover on the policy, he may still sue the office on the policy, and the partial payment which has been gratuitously made will be no defence.

PARK, J. It is with much concern that I agree with this verdict; but as the jury have found the parchment to be of the value of 2d., it cannot be said that the action is not maintainable. In *Boyter v. Dodsworth* it was considered, that the test, whether an action for money had and received could be maintained, was, whether an assize would lie; and it is clear that no assize would lie for a gratuity. I am, therefore, of opinion, that the present verdict must stand.

BURROUGH, J. The money must be taken to have been paid by the officer of the company, as a mere gratuity, and there can be no pretence for bringing this *action, to recover what was paid as a gratuity. As to the value [*268] of the parchment, there is no doubt, that the plaintiff is entitled to it, for it was by the act of the defendant that the plaintiff was prevented from obtaining it.

Rule to increase damages discharged, and motion to enter a nonsuit refused.†

† *Gibbs, C. J.*, was absent.

LIGHTFOOT v. CREED.

[2 Moore 255. S. C.]

The defendant contracted to transfer stock on a certain day to the plaintiff, but failed to perform his contract; upon which the plaintiff bought the stock, and, to recover the consequent loss sustained by him, brought an action against the defendant for money paid: Held, that such action was not maintainable, as the plaintiff should have declared specially on the contract.

ASSUMPSIT. The declaration contained the common money counts. Plea, *non-assumpsit*.

At the trial before *Dallas, J.*, at the *London* sittings after the last term, it appeared, that the defendant, on the 23d of *October*, had sold to the plaintiff

3000*l.* three *per cent.* consols, to be delivered on the 30th of the same month; that on that day, stock having in the mean time risen in price, the defendant refused to make the transfer, in consequence of which, the plaintiff employed a broker to purchase stock to the same amount, which was accordingly transferred to the plaintiff on the 31st; that the loss sustained by the plaintiff, by the defendant's not performing his contract, was 45*l.*, and that the defendant, after the action commenced, offered to pay that sum without costs. This action was brought to recover the 45*l.* For the defendant, it was objected, first, that the contract was void under the statute 7 *Geo. 2, c. 8*; and, secondly, that the plaintiff should have declared specially. *Dallas, J.*, directed a verdict to be entered for the plaintiff, with leave for the defendant to move to enter a nonsuit on both of the grounds of objection.

*269] *Hullock, Serjt.*, on a former day in this term, had accordingly obtained a rule to set aside the verdict and enter a nonsuit; and, in support of the second objection which had been made, cited *Heckscher v. Gregory*, 4 *East*, 607.

Vaughan, Serjt., in showing cause, was directed by the court to confine himself to the second point, whether this, being an action for money paid, could be maintained. He contended, that the circumstance of the defendant having offered to pay the money since the commencement of the action, was a recognition of the authority of the plaintiff to pay it to the broker at the time of the transfer, and that, at all events, it was not incumbent on the plaintiff to declare specially.

Hullock, Serjt., in support of the rule, was stopped by the court.

GIBBS, C. J. An action for money paid cannot be maintained, unless there be a request to pay it, either express or implied. This was a special contract by the defendant to transfer stock, for breach of which, the plaintiff might recover unliquidated damages. He does not do that, but affects to liquidate the damages by purchasing the stock, and sues the defendant for the difference, as money paid to his use; but it is paid without authority. There is no count in the declaration on which he can recover, if not on that for money paid; so that, if he cannot recover on that count, he cannot succeed in this action, although his claim may be otherwise well founded. The defendant contracted to transfer stock on a certain day: if he did not transfer the stock on that day, the plaintiff was entitled to call on him to make good, in the shape of damages, the loss sustained *270] by the defendant's abstaining from performance of his contract. Instead of that, the plaintiff purchases the stock, and sues the defendant for the difference, who never authorised him to purchase it, either expressly or impliedly. From the circumstance of the defendant's having agreed to pay the 45*l.*, it cannot be shown that the plaintiff thus laid out this money for the defendant's use. The plaintiff's claim on this count, therefore, cannot be supported.

DALLAS, J. It has become immaterial to consider the first point saved, whether the transaction were legal or not. The only count on which the plaintiff could have recovered, is on that for money paid; to sustain which, an express or implied authority is necessary. No authority has been proved; and the plaintiff cannot recover.

PARK and BURROUGH, J's., concurred.

Rule absolute.

MATTHEWS et al. v. SAWELL.

[2 Moore 262 S. C.]

The defendant, in 1799, agreed to take the premises for seventeen years at a yearly rent, and entered. In 1813, the plaintiffs contracted to sell the fee to *A.*, who thereupon bought from the defendant the residue of his term, and, without the assent of plaintiffs, put in a new tenant, who occupied for two years. The contract for sale of the fee was then rescinded: Held, that the plaintiffs were entitled to recover from the defendant, in an action for use and occupation, the rent from 1813 to the end of the original term, as there had been no surrender in writing of his interest, and as the plaintiffs had not assented to the change of tenancy.

ASSUMPSIT for the use and occupation of a farm in the county of *Essex*, for three years, from *Michaelmas*, 1813, for not keeping and leaving it in repair, and *for not managing and cultivating the same, according to the course of good husbandry, and the custom of the country. Plea, *non-assumpsit*. [*271] At the trial before *Dallas, J.*, at *Westminster*, at the sittings after the last term, the following facts were disclosed by the evidence. In *November*, 1799, the defendant, under a written agreement only, took the premises from the then owner, for a term of seventeen years, commencing at the preceding *Michaelmas*, at the yearly rent of 50*l.*, payable half yearly, and agreed to keep the premises in repair during the term, and to leave them in repair upon its expiration; and also to hold the premises subject to the performance of such covenants as were usually inserted in leases of farms in the same county. The plaintiffs afterwards became the owners, and in *March*, 1813, sold the fee-simple to *Harvey*. There being some difficulty in making out the title, the purchase was delayed; in the mean time, however, *Harvey* agreed with the defendant, that he should quit the premises at *Michaelmas*, 1813, which he did, and *Harvey* let them to *Allen*, who immediately took possession, and continued in occupation until *Michaelmas*, 1815. The defendant, on quitting the premises in 1813, paid all the rent then due, and gave notice to the plaintiffs of his having giving possession to *Harvey*, and that he had left the premises in good repair. In *July*, 1814, one of the plaintiffs, in a letter to the defendant, stated that she was surprised to find that the rent was unpaid, that she had heard, that *Harvey* was in possession of the premises, and requested the defendant to inform her what he knew of *Harvey*; but she did not demand the rent from the defendant, or state that she considered him liable to pay it. The solicitor of the plaintiffs afterwards demanded the rent from *Allen*, who was then in possession; and about *Michaelmas*, 1815, one of the plaintiffs demanded two years' rent *from *Allen*. In *July*, 1814, *Harvey* became a bankrupt. [*272] Not being able to make out a satisfactory title, his assignees, in *November*, 1816, agreed with the plaintiffs to waive the purchase, upon which the plaintiffs and the assignees (with the consent of the creditors) executed mutual deeds of release. In *January*, 1817, the assignees released *Allen* from all liability in respect of his occupation. The plaintiffs had not demanded any rent from the defendant from the time he quitted the premises up to *Michaelmas*, 1816. For the plaintiffs it was contended, that the agreement entered into by the defendant was subsisting, and that no act had been done to determine his liability, as well to pay the rent up to *Michaelmas*, 1816, as also to keep the premises in repair until that time. For the defendant it was contended, that at the time *Harvey* was let into possession, the plaintiffs consented that the tenancy should determine. The jury under the direction of *Dallas, J.*, found a verdict for the plaintiffs, for 150*l.* for rent, and 130*l.* for repairs; leave being given to the defendant to move to enter a nonsuit, on the ground of there having been an implied surrender of his interest under the agreement.

Best, Serjt., on a former day in this term, had obtained a rule *nisi* to enter a verdict for the defendant.

Lens, Serjt., now showed cause, and contended that the defendant, although he quitted the premises in 1813, was still liable in law. The question is, whether any acts have been done to release the defendant, who was the plaintiffs' original tenant. The circumstance of *Allen* being liable for the rent for a time does not militate of necessity with the fact of the plaintiffs' having the defendant still liable, for a lessor may hold his lessee liable on his covenant, and his assignee liable on his occupation. This letter from one of the plaintiffs, *so far from exonerating the defendant, intimates that she would hold him

*273] liable if *Allen* did not pay. The plaintiffs apply to the defendant first, and only apply to *Allen* when referred to him by the defendant. It is true, the defendant ceased to occupy the premises by the tacit consent of the plaintiffs, as they did not object to his quitting them, or to *Allen's* holding under *Harvey*, but this was under the impression that *Harvey* was to become the purchaser. There was nothing which could be construed into an assent after the bargain with *Harvey* was at an end. But what have the plaintiffs done, to release the defendant in fact or in law? They release *Harvey* from his contract to purchase, nothing more. *Harvey* discharges *Allen* from being his tenant, but that has nothing to do with the case. *Allen* was not tenant to the plaintiffs, but to *Harvey*; and if the plaintiffs had brought an action for use and occupation against *Allen*, they would have been nonsuited. They would, therefore, according to the argument of the other side, be unable to recover either against the defendant or *Allen*. But they can recover against their original tenant. In *Mollett v. Brayne*, 2 Campb. 103, it was held, that a tenancy from year to year, created by parol, was not determined by a parol license from the landlord to quit in the middle of a quarter, and the tenants quitting accordingly. *Phipps v. Sculthorpe*, 1 B. & A. 50, although not closely connected with the present case, as far as it is applicable, is in favor of the plaintiffs. There the party had precluded himself from setting up the continuance of the title of another person. This claim is not only not contradicted by that case, but is consistent with it. The defendant was liable in the first instance, and as he cannot show by what

*274] means his liability ceased, the plaintiffs are entitled to maintain this action.

Best, Serjt., in support of the rule, urged, that from the circumstances of the case a surrender must be implied. If the case stood upon an actual surrender, it is clear that it must be in writing; but a tenancy may be determined without an actual surrender. In *Mollett v. Brayne* there was no new tenancy, as in this case, nor did the lessor assent the tenant's quitting the premises, as the plaintiffs must here be presumed to have tacitly done. This is not like the case of the lessee and assignee being both liable. This landlord has two original tenants, and this is, therefore, different from the case of an original tenant's assigning without the permission of his landlord. It has never been decided that a plaintiff, who has consented to a change of tenancy, and permitted a change of occupation, can charge the original tenant for the rent due during the occupation of the new tenant. Had there been any covenant between the parties, it would not have admitted of a doubt; but here there was no covenant, and the privity of estate between the parties ceased, when they assented to the occupation of *Harvey*. In *Natchbalt v. Porter*, 2 Vern. 112, where lessee for years, having agreed with the lessor to surrender his lease, delivered up his key, which the lessor accepted, but afterwards refused to take the surrender of the lease, it was decreed that the lessee should be discharged of the rent. Here the plaintiffs' consenting that the possession should be delivered to *Harvey* was equivalent to their taking possession themselves.

Lens Serjt., on *Natchbalt v. Porter* being cited, observed, that the case was

*275] very imperfectly reported, and at last only went to show an instance in which equity would not interfere.

Gibbs, C. J. This is an extremely hard case against the defendant, and the court has been disposed to struggle to the utmost in his favor; but, after the

best consideration which we have given to the case, we find no sufficient legal ground for his escape from the claim which has been made against him. He was tenant for seventeen years; upon the lessor's death, his devisees contract to sell the fee, being entitled to this rent for three years more, and to the possession, at the end of that time, but not sooner: *Harvey* contracts to purchase: he could contract for the possession with the defendant only: this he does, at the same time informing him he wishes to let the premises to *Allen*. *Harvey* lets them to *Allen*, and he is bound to pay *Harvey* rent, because he could not set up the defendant's term as a defence, being estopped as to *Harvey*. In process of time *Harvey's* purchase goes off, and the plaintiffs release *Harvey*, and he releases *Allen*, and the parties then stand as they did at first. I should have thought it worth much consideration, whether the original tenant might not have been freed, if the original landlord had had another person liable to him for rent; but one ingredient in the statement which has been made to that effect, was, that another tenant was answerable to the original lessor. *Allen* was not liable to the original lessor. The plaintiffs left *Harvey* and the defendant to deal as they pleased, the one with *Allen*, the other with the remainder of his term. If no new tenant be answerable to the plaintiffs, it resolves the case into this statement, that the defendant was their tenant for a lease, of which three years remained, that there was a parol surrender of that lease, and that such a surrender is void under the statute of frauds. *Under these circumstances, I am of opinion, that the verdict obtained against the defendant [*276 must stand.

DALLAS, J. I, also, am extremely sorry to concur in this judgment. If the plaintiffs had in fact consented, that the defendant should, in 1813, cease to be liable, and had gone beyond that, and had accepted a substituted tenant, I should have thought the defendant discharged. But the sale was with a reservation of the unexpired part of the term *Harvey* is let into possession under the defendant, and *Allen* under *Harvey*. So far from the tenancy being determined in 1813, in 1814 the plaintiffs apply to the defendant for rent, and are referred by him to *Allen*, but plainly claiming rent to be still due to them. I, therefore, think that the tenancy was not put an end to, with the consent of all the parties, in 1813, and that the plaintiffs must recover.

PARK, J. *Phipps v. Sculthorpe* does not so nearly resemble this case as I at first thought. It does not appear that *Allen* was let into possession with the consent of the plaintiffs. The plaintiffs did not acknowledge *Allen* as their tenant, and had no remedy against him; and as there was not any legal surrender, I concur reluctantly with the court, in considering the defendant liable.

BURROUGH, J. If there had been another person against whom the plaintiffs might have sustained an action for use and occupation, I should have thought the defendant would have been discharged; but after looking with the greatest anxiety, we cannot find any other person liable, and are, therefore, obliged to hold that the plaintiff is entitled to recover.

Rule discharged.

The plaintiff agreed to take a bill of exchange drawn by the defendant and accepted by A., payable to order, in satisfaction of a promissory note for a much larger amount, on condition that the original note should revive, if the bill should be dishonored. The bill

was dishonored; but no demand was made on the defendant on the day it became due; and, on the following day, the defendant tendered the amount, which the plaintiff refused to accept, and sued on the original note: Held, that the plaintiff was not entitled to recover.

ASSUMPSIT on a promissory note for 45*l.* 5*s.* 6*d.*, drawn by the defendant, and made payable to *James Lamb*, who indorsed it to the plaintiff. At the trial before *Park, J.*, at the *London* sittings after the last term, it appeared, that the note was not paid when due, whereupon the plaintiff, finding that the defendant was embarrassed, agreed to accept 5*s.* in the pound on the amount of the note, and interest, to be secured by the acceptance of the defendant's brother; it being agreed, however, that the original note should remain in the hands of the plaintiff, and that the debt should revive, in case the acceptance of the defendant's brother should not be duly honored. A bill for the sum of 11*l.* 10*s.* 6*d.*, was accordingly drawn upon, and accepted by the defendant's brother, and indorsed to the plaintiff, who thereupon gave the defendant the following receipt. "*London*, the 26th of *April*, 1817, received of *Mr. Thomas Palmer* 11*l.* 10*s.* 6*d.*, being a composition of 5*s.* in the pound, on a bill of 45*l.* 5*s.* 6*d.*, which I accept of as a payment in full of all demands on the said *Thomas Palmer*, but without prejudice in any way to myself, or any other parties who are, or may be concerned in the said bill of 45*l.* 5*s.* 6*d.*, and the said 11*l.* 10*s.* 6*d.*, being paid me by a bill on *Mr. S. Palmer*, of *Coventry*, unless the said bill of 11*l.* 10*s.* 6*d.* be duly paid, this receipt to be null and void, *John Soward*." This bill also, when due, was dishonored; and, on the day following, the sum of 12*l.*, was twice tendered to the plaintiff, but he refused to accept it. No demand was made by the plaintiff for payment of the latter bill on the day when it became due. The defendant, *upon the action being commenced, paid
*278] 12*l.* into court. *Park, J.*, being of opinion, that the tender made the day after the bill became due, was, under the circumstances of the case, a discharge of the original debt, the jury found a verdict for the defendant.

Best, Serjt., on a former day in the term, obtained a rule nisi to set aside the verdict, and cited *Cranley v. Hillary*, 2 M. & S. 120.

Vaughan, Serjt., now showed cause, and contended that the defendant had complied with the terms of the agreement. The security of a third person having been introduced, takes this case out of the rule, that a smaller composition is no bar to the original debt. It is clear, that the defendant was ready with the money, for on the next day he made the tender. The plaintiff made no demand on him, and he could not know in whose hands this bill, which was payable to order, might be. It was meant to be a negotiable instrument, and to be put in circulation, and, before the plaintiff could have notice of the dishonor, the defendant made a tender of the amount. The plaintiff sustained no loss or injury, and the defendant did all in his power to perform his agreement.

Best, Serjt., in support of the rule, contended, that it was the duty of the defendant to have made the tender on the day upon which the bill became due, and for that purpose to have gone to the person to whom he gave the bill. He was not bound to go to every indorsee, or to hunt out the holder of the bill; but he has not done all that he was bound to do, and, therefore, the plaintiff is entitled to recover the *original debt. In *Cranley v. Hillary*, it is stated,
*279] that the person to be discharged, is bound to do the act, which is to discharge him, and not the other party, and *Dampier, J.*, said, "It is laid down by *Littleton*, Sec. 340, that the obligor of a bond, conditioned for the payment of money at a particular day, is bound to seek the obligee, if he be in *England*, and at the set day to tender him the money, otherwise he shall forfeit the bond."

GIBBS, C. J. This case bears no resemblance to those to which it is likened; and the principle on which they are decided can never be shaken. The principle is, that when a man agrees to do any particular thing, he must do all that is necessary. If it be to pay rent, he must be ready on the land; if to pay money to *A.* on a particular day, he must seek for *A.* If the defendant had

contracted to pay 10*l*. to his creditor on a particular day, and had failed, he would have been liable to the whole original debt. But he agrees to give a negotiable security, which the plaintiff consents to take, and takes it subject to the law incident to all bills, and must make a demand in the same way as on all bills. He has not proved that he presented the bill for payment, and consequently is not remitted to his original debt. This certainly was not a bill payable to the indorser himself only, which might come within the reason of a bond, but was payable to order, and bears several indorsements. As no demand on the part of the plaintiff has been proved, I am of opinion that this action cannot be maintained.

The rest of the court concurred.

Rule discharged.

*TATE et al., v. MEEK.

[*280

[2 Moore. 278. S. C.]

The defendant, as owner of a vessel, covenanted by charter-party with A., as freighter, to take on board a cargo in the *Brasils*, and deliver the same in *England*. A. covenanted to put the cargo on board, and pay freight at a certain rate *per ton*; part in money on the arrival of the vessel, and the remainder by bills at two months after the delivery of the cargo.

The owner bound the vessel and her freight, and the freighter bound the cargo, for the due performance of their respective covenants. Part of the cargo was shipped for A., and part for other consignees. The defendant delivered the goods to the other consignees, on payment of the freight, at a less rate than that contracted for by the charter-party; but refused to deliver to the plaintiffs the goods consigned to A., which A. had assigned to them, without their paying the whole of the freight due under the terms of the charter-party: Held, that the defendant was justified in detaining the goods of the plaintiffs until payment of the freight stipulated for by the charter-party, as the delivery of the goods and the payment of the freight were to be considered as concomitant acts.

THIS was an action of trover, to recover the value of forty chests of sugar, and seven hundred and eight arrobas of fustic, which was tried before *Burroughs, J.*, at the sittings after *Michaelmas* term, 1817, at *Guildhall*, when a verdict was found for the plaintiffs for 2000*l.*, subject to the opinion of the court, on a case which, in substance, stated, that the defendant, being the owner of the brig *Jane*, an indenture of charter-party was, on the 9th of *October*, 1815, executed in *London*, between him and *J. Bagshaw*, whereby the defendant, (therein expressed to be the owner of the brig *Jane*, then lying in the port of *London*, and whereof *George G. Meek*, was commander,) covenanted with *J. Bagshaw*, (therein expressed to be co-partner in, and acting on behalf of the house of trade, carried on in *London*, under the firm of *Bagshaw & Seale*.) freighter of the brig, and his assigns, for the considerations thereafter mentioned, that the brig should sail in ballast from *London*, direct to *Bahia*, on the coast of *Brazil*, where she should forthwith be rendered staunch, &c., and, being ready to load, the commander should give notice thereof to the freighter's agents at *Bahia*, and, in the accustomed manner of loading *at that place, take on board [*281 the brig, from the freighter's agents, a full cargo of sugar, not exceeding one hundred and seventy tons, and cotton, with sufficient fustic for dunnage, and no more, (the cargo, not exceeding in the whole what the brig could reasonably stow,) and immediately sail direct to the first port in the *English* channel, she should be enabled to touch at, where being arrived, her then commander should immediately give notice, by the then next following post, to the freighter, at the port of *London*, and wait with the brig until the return of the post from thence,

for the freighter's orders, either to proceed to *London*, or to any one safe port in *France, Holland, Bremen, Hambro'*, or the *Baltic*, and immediately sail direct to such ordered port, and give notice to the freighter's agent there, and make a right and true delivery of the whole cargo, agreeably to bills of lading that should be signed for the same; and, such delivery being completed, end the intended voyage. And the owner thereby agreed, that the brig should lie at *Bahia*, for receiving the cargo, sixty working days, to be accounted from the day on which the brig should be ready to load, and notice thereof given, that, in the event of the cargo being delivered at a port in *France, Holland, Bremen, Hambro'*, or the *Baltic*, the brig should lie there for such delivery twenty running days, if needful, to commence from the day on which the brig should be ready to deliver at such ordered port, and notice given; and that, in the event of the cargo being delivered in *London*, the brig should lie there for delivery fourteen running days, if needful, to be accounted from the day on which the brig should be reported in ward at the custom-house; In consideration whereof, the freighter covenanted to furnish, and, in the accustomed manner of loading at *Bahia*, send alongside the brig at that place a full cargo of sugar and cotton, with sufficient fustic for dunnage, and no more (and not exceeding *one hundred *282] and seventy tons of sugar) also to give orders as aforesaid, relative to the brig's port of discharge, and at *London*, or at one safe port in *France, Holland, Bremen, Hambro'*, or the *Baltic*, at his own costs, to receive the cargo from alongside the brig, within the times thereinbefore limited for those purposes, or days of demurrage thereafter granted; and also to pay or cause to be paid to the owner, for the freight or hire of the brig for the voyage, in case the cargo should be delivered at *London*, after the rate of 7*l.* sterling *per* ton, for every ton of sugar, net weight at the king's beam, that should be so delivered, and so in proportion for less than a ton, 2*d.* *per* pound for the cotton that should be so delivered, and 3*l.* 10*s.* *per* ton for the fustic so delivered, and so in proportion for less than a ton, together with 5*l.* *per cent.* primage, and that the freight and primage should be paid as follows, *viz.* 300*l.*, part thereof, to be paid in cash forthwith, on the day the brig should be reported in ward at the custom-house, in the port of *London*, on her return from the voyage, and the remainder of the freight and primage to be paid by a good and approved bill or bills, payable in *London*, at two months after date, from the day on which the delivery should be completed; but provided, and it was thereby mutually covenanted, that in case the brig should be ordered to proceed to, and deliver her cargo at, any other port within the before-mentioned limits, the whole of the aforesaid rate of freight and primage, or as near the whole thereof as could then be ascertained, should be paid as follows; *viz.* 300*l.*, part thereof, to be paid in cash, forthwith, on the day on which orders should be given for the brig to proceed to a foreign port; and the remainder thereof to be paid by a good and approved bill or bills, payable in *London*, at three months after date from the same period, as and for the *283] freight of the aforesaid cargo and primage thereon, from *Bahia* *to *England*, only; and that the further freight of the cargo, from her port of receiving orders in the *English* channel to her ordered port of delivery, and primage thereon, should be calculated and settled pursuant to the award of two impartial and experienced arbitrators, one to be chosen by each of the parties, with power to choose a third, whose award, or that of any two of them, the parties thereby bound themselves to perform; and that in such case, the residue of the freight from *Bahia* to *England*, (if any,) together with the further freight to be so settled, should be paid by the freighter's agents at the brig's ordered port of delivery, within one month after delivery of the cargo. Provided, and it was declared, that it should be lawful for the freighter to ship on board the vessel in *London*, all such lawful goods as he might think fit, on his own account, and which the owner thereby agreed should be delivered at *Bahia*; and in such event, the freighter engaged, at his own cost, to defray all extra custom-house and port charges that would be incurred in *London*, and all custom-house

charges, consulage, and other expenses that would be incurred at *Bahia*, in consequence of the vessel clearing out at the custom-house in *London*, and arriving at *Bahia* with goods, instead of in ballast, and should likewise pay to the owner 50*l.* for the freight of the outward goods, previous to the vessel leaving *London*; and in such case, the number of days expended in loading the goods, (to be accounted from the 11th instant, *October*.) should be deducted from the lay-days allowed for loading the homeward cargo at *Bahia*: provided also, that in case any other goods than these shipped by the freighter, should be conveyed on board the brig from *London* to *Bahia*, the freight for the same should be equally divided between the parties thereto. Moreover, the owner agreed, that it should be lawful for the freighter to keep the vessel on demurrage at her ports *of loading and unloading, thirty running days in the whole, over [284 and above the aforesaid lay-days, on paying to the commander 6*l.* per day, day by day, as the same should become due; and to the true performance of the foregoing covenants, the parties respectively bound themselves especially; the owner binding the vessel, her freight, and appurtenances, and the freighter, the merchandise to be laden on board her, each to the other of them in 2000*l.*

The vessel having arrived at *Bahia*, the agents of *Bagshaw & Seale*, at that port, caused to be shipped on board the goods mentioned in the declaration, *viz.* forty chests of sugar and seven hundred and one arrobas of fustic, (which, at the time of such shipment, and of the assignment hereinafter mentioned, were the property of *Bagshaw & Seale*,) together with other merchandise consigned to other persons in *London*; and a bill of lading of the sugar and fustic, the subject of this action, was thereupon, on the 27th of *March*, 1816, signed by *Geo. G. Meek*, the captain of the brig, acknowledged to be shipped in good order, by *Toole & Weiss* of *Bahia*, in the brig *Jane*, *Geo. G. Meek* master, then lying in the port of *Bahia*, and bound for *London*, forty chests of sugar, weighing one thousand six hundred and sixty-nine arrobas, and sixteen pounds, and seven hundred and eight arrobas of fustic, to be delivered in the like good order, and well conditioned in *London*, (dangers of navigation excepted,) unto *Bagshaw & Seale*, or to their assigns, he or they paying freight for the said goods as *per* charter-party, and average accustomed.

The brig sailed upon her homeward voyage, and arrived in *London* with her cargo, and was reported inwards at the custom-house, on the 15th of *June*, 1816. The freight of the sugar and fustic, calculated according to the rates mentioned in the charter-party, amounted to 214*l.* 6*s.* 4*d.* The other goods, carried on board the brig from *Bahia* to *London*, in the voyage, were there *delivered by the defendant to the owners of the goods to whom they [285 were consigned, upon their paying the freight which was reserved by the respective bills of lading thereof, amounting to 661*l.* 13*s.* 10*d.*, and which the defendant received without the consent of *Bagshaw & Seale*, or of the plaintiffs, from the respective consignees of such goods. The rates of freight contained in such bills of lading, were less than those stipulated by the charter-party. *Bagshaw & Seale* having become insolvent, they, by deed, dated the 18th of *June*, 1816, assigned their property and interest in these sugars and fustic to the plaintiffs, in trust for themselves and the other creditors of *Bagshaw & Seale*. The freight of the whole cargo, calculated according to the terms of the charter-party, would have amounted to 1681*l.* 8*s.* 9*d.*

No tender or offer had at any time been made by the plaintiffs, or *Bagshaw & Seale*, of any part of the freight, either in money, bills, or otherwise, and the same still remained unpaid. The plaintiffs, before the commencement of this action, and after the execution of the assignment to them, demanded of the defendant the sugars and fustic, which were then in his possession, but the defendant refused to deliver the same without payment of the freight due under the charter-party. The question was, whether the plaintiffs were entitled to recover. If the opinion of the court should be in their favor, the verdict was to

stand, but the goods were to be taken by them in lieu of damages; if against the plaintiffs, a nonsuit was to be entered. Either party was to be at liberty to turn the facts of the case into a special verdict.

The case was argued on a former day in this term, when,

Best, Serjt., for the plaintiffs, contended that the defendant had no lien, as
 *286] had been decided by this court *in the late case of *Hutton v. Bragg*,† which completely governed the present case. No tender at all had been made in this case, but none was necessary; for it is stated that the defendant refused to deliver these goods, unless on payment of the freight due on the charter-party. The defendant, therefore, having delivered out other of the goods on payment of a lower rate of freight, than the freight stipulated in the charter-party, claims to retain the rest, not for a proportional freight, but for the whole uncollected residue. The only difference between this case and *Hutton v. Bragg*, is in the mode of payment, which there, is in an aggregate sum, and here, is calculated at a certain rate per ton of the ship's contents; and that there, the owner receives it as a dead freight; here, according to the quantity of the goods brought. But the principle is the same in both cases; here, as well as there, the ship-owner parted with the possession of the whole ship: so completely has he parted with it, that the defendant takes no pains to fill up the ship, and the freighter does take in goods at an inferior rate of freight. The freighter has not only the entire possession, but the conduct of the vessel: he is to send her to *England, Holland, Bremen, or Hamburgh*, at pleasure. The space of stowage contained in the ship, and the voyage, are equally at his disposal; and this case is, therefore, within the principle stated by the court in delivering their judgment in *Hutton v. Bragg*. The proposition that there can be no lien where a specific price is agreed on, stated in *Bacon*, (5 Bac. Abr. *Trover*, 271.) and in the case of *Brenan v. Currin*,‡ upon examination of the
 *287] cases cited, is not supported by them to that extent. (*Acc. per *cur.*§) But the lien may remain, notwithstanding that there was a special agreement as to price. Yet the special agreement for a mode of payment inconsistent with the lien, does toll the lien. *Gibbs*, C. J., has accurately stated the principle in *Hutton v. Bragg*, and, here, the special agreement is inconsistent with the lien. Here the 300*l.* is to be paid on reporting inwards, but the remainder of the freight is only to be paid by a bill at three months, computed from the day on which the delivery is to be completed. That is quite inconsistent with the continuance of a lien, which would enable the ship-owner to say, that he would not deliver a bale of the goods till all the freight was paid. If the defendant stood on the common doctrine of lien, he would have only a lien for the freight of these specific goods; but he insists on holding them till he shall be paid the freight stipulated in the charter-party, he must, therefore, show, that in the charter-party, there is any such stipulation. The cases of *Birley v. Gladstone*, 3 M. & S. 205. and *Phillips v. Rodie*, 15 East, 547, are also in point. Here, freight at which the goods of the other persons were taken on board, and which was less than the freight stipulated in the charter-party, was expressed in the bills of lading, which were signed for those goods, and those goods were, therefore, deliverable immediately. The case then thus stands. The ship goes out, the freighter having the control of the whole: the freighter may take in goods at a lower rate than is stipulated in the charter-party, the owner cannot; the freight payable for those goods is payable to the freighter, not to the ship-owner. Suppose the ship arrives, the owner
 *288] of the goods put on board on the lower rate of freight, is *entitled to an immediate delivery, but only on the terms of immediate payment: he is not bound to pay the ship-owner, (laying aside the 300*l.*, as out of the case,) otherwise than by bills to bear date from the entire delivery.

† *Ante*, vii. 14. S. C. 2 *Marsh*. 339.

‡ *Sayer*, 224. *Bull. N. P.* 7th ed. 45.

§ [See 5 *Maule & Selw.* 180, *Chase v. Westmore*. *Yelv.* 67. *note*.

Copley, Serjt., contra. The plaintiffs' counsel puts this on three points. 1st, That these goods were not in the possession of the ship-owner, but of the freighter. 2dly, That the mode of payment is by a special agreement, of such a nature, that this lien is inconsistent with it, and, therefore, cannot be supported. 3dly, That the defendant's claim is in the nature of a lien for dead freight, for which no lien can exist. But the defendant's proposition is, that the vessel never was meant to be in the possession or control of the freighter, except by force of the covenant. In the cases in which the possession has been held to be transferred to the freighter, the words "let to hire," or "let to freight," are found analogous to the words of demise in a lease; on those words the freighters might bring trover for the vessel, if carried out of her course. It would be absurd to contend, that any one could maintain trover on a covenant by the owner to go. In the case of the *Trinity-House v. Clark*, 4 M. & S. 288, Lord *Ellenborough*, C. J., insists on the force of these words, that "the charter-party grants the ship," and "lets it to hire and freight," which are proper words of lease, and would of themselves pass the possession. "The commissioners "hire and retain," and the proprietors of the vessel "warrant the use of the ship." There was a strong case of possession, as contradistinguished from a mere charter-party which rests in covenant. All this arises on the "old form of charter-party, by which, according to the [289 books, the possession was in the freighter. The words were, "let to freight," and "let to hire," and the old law was founded on that form. The freighter in the present instance had no possession of the vessel, either on the nature of the instrument, the nature of the employment of the vessel, or any circumstances of fact proved. It is said that there is a special agreement which discharges the lien: not so. The lien continues after the merchandise is put on shore: the ship-owner cannot detain the goods on board till payment, for then the owner of the goods could not inspect them. The stipulation for present payment of the 300*l.* does not destroy the right of lien. If a certain sum is to be paid for freight, a stipulation that a specific part of it shall be paid on shipping the goods, does not destroy the lien. It makes no difference whether the payment is to be by a bill or money. A delivery from the vessel must be progressive, but the captain may put the goods on shore, all subject to inspection, and make his delivery of the whole together instantly. The third objection is of no weight. The freighter goes to *Bahia*, he has not goods enough of his own to fill the vessel, therefore, he takes in the goods of others. The ship-owner delivers the goods by his orders; as between the defendant and the plaintiffs, they are the plaintiffs' goods. The defendant has nothing to do with the plaintiffs' bills of lading between him and the consignees. It does not follow that the defendant loses his lien, because the goods shipped are the goods of strangers. The defendant has nothing to do with the transaction between the freighter and the consignees: he claims freight according to the charter-party, and having delivered a part, asserts that he has a lien on the residue, till he is paid his freight.

*Moreover, the bill of lading of the goods signed in *Bahia*, expresses [290 that they shall be delivered to the freighter or his assigns, paying freight according to the charter-party, i. e. according to the mode stipulated in the charter-party, which imports that these goods are not separately deliverable to the consignees, on payment of the separate freight, at which each was taken on board by the freighter; but that each consignee has subjected himself to the same liability to a lien for the whole, to which the freighter is subject. The question of dead freight does not arise.

Best, in reply. The attempt made to distinguish this case from *Hutton v. Bragg*, on account of a supposed difference in the terms of the charter-party is unavailing, for the judgment there proceeded on the case stated, in which there was no such words, so that that distinction never appeared to the court, nor is relied on in their judgment. [*Gibbs*, C. J. The court certainly con

sidered that as a charter-party, similar to the charter-party stated in *Vallejo v. Wheeler*, Cowp. 143, where the words "let to freight," were used. Many words and facts are taken as being in a case, which are not expressly pointed out.] In the *Trinity-House v. Clarke*, it was argued, that the crown had only the benefit of a contract and covenant, and Lord *Ellenborough*, does not decide the case on the words of "letting to freight," but on the ground, that the crown could not have the benefit of the contract, unless the court attributed the possession to it. In this case, as in that, the contract requires the possession to be attributed to the freighter, Lord *Ellenborough* argues, there, on the nature *291] of the service to be *performed. The same reason applies here. It there was argued at the bar, that the ship could not be in the possession of the crown, because the crew and the captain were under the control of the owner, but the court did not adopt that reasoning. *Soldergreen v. Flightt* has been cited, to show that the ship owner may detain the goods for the freight of all the goods belonging to the same person. That proposition gives effect to the plaintiffs' argument; for, here, if all the goods are to be taken as belonging to the same person, the possession of the ship belongs to him also; but that doctrine only applies to the goods of one owner comprehended in bills of lading, signed between the same parties: where the bills of lading are between different parties, all the goods can be connected together only by an action on the covenant. It may be admitted, that there is in this case no dead freight, that word has improperly been introduced here from the case of *Phillips v. Rodie*, where it was held, that the owner could not retain for dead freight; but on the same principle, he cannot retain for the difference between the actual freight and the covenanted freight. The defendant's counsel now admits, that he does claim to retain these goods till all the freight is paid under the charter-party, to which the ship-owner can entitle himself. But he only has a lien for the carriage of the goods; he cannot have a lien for any such deficiency of payment as this. To say, for instance, of the goods shipped at the lower rate, that after the ship owner has received the actual freight at the market price of freight, he shall retain the same owner's goods for the payment of something more, is to contend for the right to retain the goods, to enforce a written instrument, by means which the instrument does not give.

Cur. adv. vult.

*292] *GIBBS, C. J.*, now delivered the judgment of the court. After recapitulating the case, (in the course of which he observed, that the charter-party stipulated for payment of freight according to the bills of lading, and that the bills of lading on the goods of the other persons made them deliverable to the respective consignees, and that 1683*l.* 8*s.* 9*d.* was the sum which the owner of the ship was entitled to require of the charterers at all events, what bargain soever the latter might make with others for carrying their goods at a less rate of freight, than that which the ship owner was entitled to claim from themselves;) his lordship stated the question to be, whether the merchant was entitled to have his goods delivered to him without satisfying the ship owner for the whole freight for which he let his vessel, and proceeded thus. This, and the two other cases† dependent on it, stand on a very different ground from *Hulton v. Bragg*. There was no covenant for the delivery of the goods, nor any question on the effect of cross covenants for the delivery of the goods on the one side, and the payment of freight on the other side. Here, the ship owner covenants, that he will deliver the goods agreeably to bills of lading. And the merchant covenants, that the freight and primage shall be paid as follows, viz. 300*l.*, part thereof to be paid in cash, forthwith, on the day the brig should be reported inward at the custom-house in the port of London on her return from

† *Abbott on Shipping*, 4th ed. 258.

‡ *Yates v. Bailston*, post 293, and *Yates v. Meynell*, post 302.

the voyage, and the remainder of the freight and primage to be paid by a good and approved bill or bills, payable in *London* at two months after date, from the day on which the delivery shall be completed. The ship was duly laden at *Bahia*, and bills of lading were signed, making the goods deliverable to the freighter or his assignees, they paying freight according to the charter-party. *The goods now in question remained undelivered at the disposal of the master. The merchants required these goods to be delivered to them [293 without tendering any bill or security. The question is, whether the delivery of the goods and the payment by a bill be not concomitant acts, which neither party is obliged to perform without the other being ready to perform the correlative act. We think they are such. If the whole cargo had been one bale of goods, there would have been no doubt. But the difficulty is, that the remainder of the freight is to be paid by bills to bear date from the day of the delivery, and the delivery may take several days. We think the captain might obviate this by landing the cargo in his own name, and tendering a bill for the whole amount dated from that day. We are the more satisfied with this judgment, because it not only meets the justice of the case, but the parties, if dissatisfied with it, have the liberty reserved to turn the case into a special verdict.

Judgment for the defendant.†

† [See 2 Barn. & Ald. 503, *Saville v. Campion*. 4 ib. 638, *Faith v. East India Company*. 2 Brod. & Bing. 410, *Christie v. Lewis*.]

YATES et al., Assignees, &c., of ASHTON et al., Bankrupts, v. RAILSTON.

[2 Moore. 294. S. C.]

The owner of a vessel covenanted by charter-party to let the vessel on freight, and to deliver the cargo in good condition; and the freighters covenanted to pay the freight on delivery of the cargo, part in money, and the remainder by bills at four months: Held, that the owner might detain the cargo until payment of the freight, the delivery of the cargo and payment of the freight being concomitant acts.

TROVER to recover the value of certain timber; on the trial of this cause, at the sittings in *London* after *Hilary* term, 1817, before *Burrough*, J., a verdict was found for the plaintiffs, subject to a case with liberty *to either party [294 to turn the facts into a special verdict. The plaintiffs, *Yates*, *Harrop*, and *Highfield*, were the assignees of *J.* and *M. Ashton*, now bankrupts, who had been timber merchants at *Liverpool*; and the two other plaintiffs, *Frazer & Davidson*, were merchants residing at *Miramichi* in *New Brunswick*, who, together with *John Ashton*, were jointly interested in the property in question; the defendant, *Railston*, by deed indented, made the 23d of *April*, 1816, granted, and let to the bankrupts, and they thereby took to freight his ship, the *Agincourt*, of three hundred and forty-six tons, on a voyage from *Miramichi* to *Liverpool*, *Hull*, or *Londun*, at the option of the freighters, as determined upon by them, upon the arrival of the vessel at *Miramichi*, upon the terms and conditions thereafter mentioned; and the defendant thereby covenanted with the bankrupts, that the master, with the crew of the vessel, should forthwith sail in ballast from *North Shields*, and proceed to *Miramichi*, and on arrival there, should take on board, with all convenient speed, from the agents of the bankrupts, a full cargo of fir timber, with a proportion of hardwood, not to exceed

thirty tons, and such a quantity of lathwood and planks as should be requisite for broken stowage, and should therewith proceed to *Liverpool*, *Hull*, or *London*, according to the instructions which the master should receive at *Miramichi* from the bankrupts, their agents or assigns, and there deliver the same to the bankrupts or their assigns, and so end the voyage; and further, that the vessel should, at the commencement, and during the continuance of the voyage, at the defendant's expense, be, and be kept staunch, &c., and sufficiently provided with necessaries for such a vessel and voyage; the dangers of the seas, &c., excepted. In consideration whereof, the bankrupts covenanted with the defendants, that they would, at their expense, within the *295] time thereafter *mentioned, deliver the cargo to the ship at *Miramichi* in the usual manner; and also receive the same from along side the vessel, at that one of the said ports in *Great Britain*, to which they should direct the master to proceed upon the conclusion of the intended voyage; and also would pay to the defendant for the freight of the vessel home from *Miramichi*, 3*l.* for every load of fifty cubic feet of fir timber and hardwood delivered as aforesaid, 2*l.* for every four feet of lathwood, with the customary proportion of freight for other broken stowage, with 3*l.* per cent. on the gross amount of the freight, in lieu of all pilotage and port charges; and that the said freight and per centage thereon should be paid upon safe delivery of the cargo, viz. one equal third part thereof in cash, and the remaining two-third parts by approved bills drawn upon or payable in *London*, at four months' date; and it was thereby agreed, that the bankrupts should be allowed sixty running days for loading the vessel at *Miramichi*, computed from the time of the master giving the bankrupts notice of the vessel's being arrived at proper places for loading and discharging. And further, that in case the bankrupts should not cause the cargo to be delivered to and received from the vessel in the customary manner at the ports of *Miramichi*, and of one of the said ports of *Great Britain*, within sixty running days, the vessel being then reported, and ready to load, and discharge; then they, the bankrupts, should pay to the defendants 7*l.* per day, for every day above the sixty running days, and for the true performance, the defendant bound himself, his heirs, &c., and the ship, her freight and appurtenances, and the bankrupts bound themselves, their heirs, &c., and the cargo to be laden on board the vessel, mutually to the other party in 1500*l.*

*296] *The timber in question was shipped on board the *Agincourt* at *Miramichi*, under an agreement, signed by *Fraser* and *Davidson*, purporting that *Frost* and *Ashton* and *Fraser* and *Davidson* agreed to import about one thousand tons of pine timber into *Liverpool* that season, on joint account, *Fraser* and *Davidson* to charge 25*s.* sterling per ton for the timber, and in proportion for broken stowage. The amount invoices to go against the goods shipped that season, provided the vessel sent for it got safe out. In case the vessel were lost, to make sale of the timber above mentioned. Such timber was consigned to the bankrupts at *Liverpool*, and in the bill of lading, signed by the master, it was expressed to be shipped by *Fraser* and *Davidson*, in the *Agincourt*, *Close*, master, then in the river *Miramichi*, and bound for *Liverpool*, and was to be delivered at *Liverpool* (the act of God, &c. excepted) unto order, or to their assigns, he or they paying freight for the said goods, as per charter-party, with primage and average accustomed. On this bill of lading was indorsed an order, by *Fraser* and *Davidson*, to deliver the contents to the bankrupts, *John Ashton & Son*, or order. Previous to the arrival of the vessel at *Liverpool* the *Ashtons* became bankrupts. On the arrival of the ship at *Liverpool*, the master, on the 7th of *October*, 1816, gave notice to the plaintiffs, as the assignees of the bankrupts, that the *Agincourt*, under his command, from *Miramichi*, on account of the estate of Messrs. *Frost & Ashtons*, was then birthed in the king's dock. On the 8th of *October*, the defendant offered to the plaintiffs to deliver them the cargo on the freight, as per charter-party, being paid or secured to them. The plaintiffs demanded the cargo from the defendant,

to be delivered to them without payment, or security for payment; but the defendant refused to deliver the cargo, unless the *freight were paid, [*297 according to the charter-party, or security given for its payment. The question for the opinion of the court was, whether the defendant had a lien on the cargo for the freight. This case was argued in *Trinity* term, 1817, by

Pell, Serjt., for the plaintiffs. He contended, that the case was not distinguishable from that of *Hutton v. Bragg*,† unless in one circumstance. The principle is, that if the owner charters a vessel to hire to another, who is to convey goods on board the vessel, then the owner of the vessel cannot detain the goods on board the vessel, for the purpose of securing to himself the freight. He admitted, that if a merchant puts goods on board another man's vessel, he cannot have the goods out again, till he pays the freight; but if another lets out his wagon or vessel to the merchant, the ship-owner has no right to detain the goods. If the ship-owner had not the continued possession of the vessel, he never had the legal possession of the goods; if he never had legal possession of the goods, he had no lien. A tortious possession gives no lien; and the circumstance of the owner's servant continuing in the ship, as the servant of the charterer, makes no lien. In the case of *Hutton v. Bragg*, the reservation of the cabin was a stronger circumstance in favor of the ship-owner, than any which exists here; but the decision rests not on those minute circumstances.

Blosset, Serjt., *contra*. If the case of *Hutton v. Bragg* establishes the principle alleged by the plaintiffs, the case is not law. Their position is, that the mere circumstance *of a general letting of the entire ship converts [*298 the charterer into an owner for the time being, and displaces the right of lien. This doctrine is contrary to all the text writers of this country. *Beawes*,‡ defines freight to be a sum agreed on for the hire of a ship, entire or in part. The common form of a charter-party for an entire ship, is, that the ship is let. In defining freight, no distinction exists between the "hire of an entire ship, or of some principal part thereof," nor between the "entire ship, an entire part of the ship, or for each ton or other portion of its capacity;" nor does any such distinction exist in the decided cases. In *Phillips v. Rodie*, 15 East, 517, the entire ship was chartered for the voyage; a question arose, on the right of the owner to detain the goods for dead freight, and it was held, he had not that right; but it never was questioned, that he had a right to detain the goods for the ordinary freight. In *Birley v. Gladstone*, 3 M. & S. 205, the question was, whether the right being admitted, of detaining for freight the goods brought home, the detainer could be extended, to secure payment of freight for goods shipped, but relanded in the course of the voyage; and the Court of King's Bench held that it could not. *Christy v. Row*, Ante, i. 300, is cited in *Shepard v. Bernales*, 13 East, 565, as deciding this point, that where there was a charter-party, and a bill of lading also, the captain was not bound, at his peril, to insist on payment of his freight, at the time of delivering the goods, but might deliver them without payment, and sue the charterer. The case of *Wilson v. Kymer*, 1 M. & S. 157, affords the same argument. It was there held, that the master not only might detain goods for the freight while they were on board the ship, but might detain *them in the *West India* [*299 docks for the freight. In *Shepard v. Bernales*, the question was made, whether the captain was not bound to detain the goods till payment of the freight. But the very circumstances of this case exclude all idea of ownership in the freighter, and, therefore, distinguish it from *Hutton v. Bragg*. The owner here reserves to himself every species of control over the ship. He covenants that his master and crew shall take on board such a cargo as is described, and proceed to the destined port; that he, the defendant, will keep his ship tight staunch, go to certain places, and receive certain sums of money for freight, calculated on a rate of goods. It is unnecessary here to inquire whether a charterer, if he.

† Ante, vii. 14. S. C. 2 Marshall, 339.

‡ Beawes *Lex Mercat.*

by particular agreement, puts the goods of others on board, might not, by that agreement, acquire a lien for the freight of those goods; he may, by that sub-contract, acquire a lien; goods may, in law, be subject to a double lien. An observation here arises, that applies to many cases cited in *Hutton v. Bragg*. The freighter of a ship may, in many cases, be considered as owner *pro hac vice*. As if, having the management of the voyage, he commits barratry, for the consideration of that act, he shall be deemed owner, and so his act is no barratry. So, he may, either impliedly or by express contract, be liable for the repairs of the ship under his command. This is all that the cases of *Parish v. Crayford* and *James v. Jones*† establish; and it is justly there observed, that the freighter might sue the owner of the ship as owner, if his goods were lost, and as trustee for the merchants, if their goods are lost. Another observation arises, if this be a parting with the interest in the ship for the voyage, why does *300] it not require registration? if the time *be so short as not to render it necessary, will a letting for six years or for sixty years require it? It will open a door to fraud, if the court hold, that, by a charter-party of affreightment, an owner may depart with an interest or property in a ship, for any indefinite time; and that yet the transfer needs not to be registered. The case of *Tallejo v. Wheeler* occurred, not only before the stat. 26. G. 3., but was a case of barratry. So also *Nutt v. Bourdieu*, 1 T. R. 323. One more case, cited in *Hutton v. Bragg*, is *Paul v. Birch*, 2 Atk. 621. There may be a contract for so letting a ship, as to depart with the ownership, but a common charter-party has not that effect. In the case of *Paul v. Birch*, there was no contract to carry goods on any specified voyage; the ship was hired at 48*l.* per month, and the factor contracted with certain merchants to carry their goods. Lord Hardwicke, Chancellor, relies on this, that the first taker was at full liberty to put in what master he pleased, and also the mariners. It was next to impossible, in *Hutton v. Bragg*, that the ship-owner should at all look to the detention of the goods, as a security for his freight; for he was to have the three-fourths of the freight before the goods were shipped, and one-fourth at a certain day after. *Moorsom v. Kymer*, 2 M. & S. 314, is also applicable. *Brenan v. Currint*, Sayer, 224, and *Buller's Nisi Prius*,§ establish the doctrine, that where there is a special agreement for the price, there can be no lien.¶ Some inference also arises here from the bill of lading. The freight to be paid in *Hutton v. Bragg* was a gross sum, and not freight measured by the rate of the *301] goods put on board; but it certainly is competent for parties, by *their contract to make the goods liable to the freight, and by contract, to compel the master of the ship to detain the goods for the freight. Admitting that the master was the servant of either owner, he had a right, and was bound, according to the tenor of the bill of lading which he had signed, to detain the goods until the freight was paid. It strongly shows, that this was not a letting of the use of the ship, and was nothing but a contract for the carrying of goods on board the ship; and the master, as the servant of the original owner, and in the authority still continued to be derived from him, signed this charter-party, and was bound to obey it.

Pell, in reply. The defendant's counsel has not shown any valid distinction between this case and *Hutton v. Bragg*. In the concluding clause of this charter-party, as well as in *Hutton v. Bragg*, is found, the clause whereby the parties oblige the ship and cargo to each other. If this fact ought to have weight, nothing can be stronger, to show that the goods are liable for the freight. A distinction is taken between this case and *Hutton v. Bragg*, that here, the owner was bound to repair the ship during the voyage; but so was it stipulated in *Hutton v. Bragg*, that the master was to put the ship in repair at the *Cape of Good Hope*. In *Hutton v. Bragg*, he cabin was reserved; here, indeed, there

† *Abbott on Shipping*, 4th ed. 22.† *Abbott*, 4th ed. 23.§ *Bull N. P.* 7th ed. 45¶ [See 5 Maule & Selw. 180, *Chase v. Westmore*, 2 Phil. Ev. 123, *contra*.]

is no such reservation. The cases now cited for the defendant were not cited in *Hutton v. Bragg*. It is said, that there a part of the sum was to be paid before the determination of the voyage. True, but a part was to be paid subsequently, and, therefore, no distinction exists between the two cases. No argument arises on the register act, for though the hirer is owner, with reference to the owner, yet the owner continues owner, *with reference to the public. *Paul v. Birch* would seem to give weight to *Parish v. Crawford*, [*302 but *Parish v. Crawford* is altogether overruled. *Gibbs, C. J.*, truly observes there, that no case was cited where, the charterer having put goods of his own on board, it had been held, that the owner could detain them till the freight was paid. The stipulation in the bill of lading for delivery of the cargo on payment of freight, does not distinguish the cases.

Cur. adv. vult.

GIBBS, C. J., on this day, after delivering the judgment of the court in the cause of *Take v. Meek*, Ante, 280, proceeded to give judgment in this cause also. After referring to the terms of the covenant and of the bill of lading, he pronounced, that the same observation which had been made in *Tate v. Meek*, applied here; that the delivery of the cargo and the payment of the freight, were concomitant acts, and the one could not be required without performance of the other.

Judgment for the defendant.†

[† See authorities cited at the end of the preceding case.]

YATES v. MEYNELL.

[2 Moore 297. S. C.]

In a similar case, of *Yates v. Meynell*, his Lordship then gave the following judgment. Here, also, the freight is to be paid on the delivery of the goods. In all these cases the difficulty exists, which I stated in the first of them, that the remainder of the freight is to be paid by bills, to bear date from the day of the delivery, and the delivery may take several days. But, for the *reasons stated in the first of them, we are of opinion, in all these cases, [*303 that the owner of goods cannot require them to be delivered, without satisfying the ship-owner for the freight that remains due.

Judgment for the defendant.

WHITE, Demandant; BICKNELL, Tenant; PAPILLON, Vouchee.

[2 Moore 299. S. C.]

A recovery of 1729, amended by adding premises which were comprised in the deed to lead the uses, but for which the king's silver had not been paid.

HEYWOOD, Serjt., moved to amend this recovery, which was suffered in 1729, by inserting the words "all the tithes to the said manor of *Bentley* belonging," the tithes being included in the deed to lead the uses. [*Gibbs, C. J.* You are

asking to insert premises for which the king's silver was not paid in 1729, and the parties have kept the money all this time.] The king's silver will be paid on the present increased value of the tithes, not on their value, in 1729.

GIBBS, C. J. The court on consideration, will permit you to take your rule in the present case. Whether they will think it expedient to lay down a new rule I know not. Lord *Alvanley*, never would accede to these amendments, although the majority of the court did.

Fiat.



*304]

*GENT, et al., v. ABBOTT.

[2 Moore 301. S. C.]

A capias quare clausum fregit issued against *A.* and *B.*, with an *ac etiam* in debt, upon which *A.* was arrested. A special original in debt, a *capias*, *alias* and *pluries*, and writs of *exigent*, issued against both, and *B.* was outlawed on the 23d *October*; after which a declaration in debt on the original was delivered against *A.* only, entitled of *Trinity* term: Held, that the bail were not entitled to be discharged on a motion for that purpose, upon the ground of a variance between the declaration and the process upon which the defendant was arrested.

BOSANQUET, Serjt., on a former day in this term, had obtained a rule *nisi* that the bail for the defendant might be discharged, on an affidavit which stated that a writ of *capias quare clausum fregit*, directed to the sheriff of *Middlesex*, was issued by the plaintiffs against the defendant and one *Maitland*, with an *ac etiam* in debt, returnable on the morrow of the *Holy Trinity*: that upon this writ the defendant was arrested, and justified bail: that a special *capias*, grounded upon an original in debt, issued against the defendant and *Maitland*, returnable in five weeks of *Easter*; also an *alias* against both, returnable on the morrow of the *Holy Trinity*, and a *pluries* against both, returnable in three weeks of the *Holy Trinity*: that the sheriff returned, that neither the defendant nor *Maitland*, were to be found in his bailiwick; whereupon writs of *exigent* were issued against both, returnable on the morrow of *All Souls*, and that *Maitland*, was thereupon outlawed on the 23d of *October*: that on the 26th of *November*, a declaration in debt on the original against the defendant only, containing an averment that *Maitland* had been outlawed in the suit, was delivered; and that the defendant had pleaded to the declaration, but had not appeared to any other process at the suit of the plaintiffs than the writ of *capias quare clausum fregit* above mentioned. *Bosanquet* contended, that the bail were discharged, as there was a variance between the process upon which the defendant was arrested and the declaration delivered after the outlawry of *Maitland*; whereupon

*305] **Best* and *Copley*, Serjts., showed cause, and contended that the proceedings in the cause had been regular throughout; and that as the defendant had been duly arrested, and had put in bail under the original process, the circumstance of *Maitland*, being outlawed could not operate to discharge the bail. The declaration corresponded with the *ac etiam* clause of the writ, and there was therefore no variance. Besides, this application was now too late; it should have been made in the first instance.

Bosanquet, in support of the rule, insisted that the bail were entitled to their discharge, as the situation of the cause was altered since they had become bound for the defendant. If the plaintiffs had adhered to their process, they never could have proceeded against the defendant until *Maitland* had appeared. The original writ was in trespass; it should have been in debt to have corresponded with the declaration. The principle, upon which bail are required to apply in

the first instance, does not effect this case ; and no authority has been cited to show that they are now precluded.

Cur. adv. vult.

On this day the court delivered judgment.

DALLAS, J., (after stating the facts of the case.) The proceedings in this case have been consistent with the established practice of the court. But we think that we ought not, on this motion, to decide the question, but to leave the plaintiff to his remedy against the bail, and the bail to their defence against the action ; and, especially in this case, where the officers of the court certify that the course taken has been conformable to the practice. The rule, therefore, must be discharged.

Rule discharged.†

† See *Ante*, 188. Gibbs, C. J., was absent.

*DOE, on the joint Demise of LE CHEVALIER, and his Wife, and [306
on his separate Demise, v. HUTHWAITE, et al.

[2 Moore 304. S. C.]

A. devised lands to G. H., the eldest son of J. H., for life ; remainder to his issue ; remainder to S. H., the second son of J. H., for life : remainder to his issue ; remainder to J. H., the third son of J. H., for life ; remainder to his issue ; with divers remainders over. J. H., was the second son, and S. H., the third son of J. H. : Held, that S. H. became entitled on the death of G. H. without issue.

EJECTMENT. At the trial at the last Summer assizes for the county of Nottingham, before Holroyd, J., a verdict was found for the plaintiff subject to the opinion of this court, on a case, of which the following is the substance, with liberty to either party to turn the same into a special verdict.

By a will dated the 17th of May, 1781, George Donstan, devised his real estate to trustees, to the uses following, (that is to say,) to the use of Starkey Donstan, son of Henry Donstan, and his assigns for his life ; with remainder to the use of trustees, to preserve contingent remainders ; with remainder to the use of the first and other sons of Starkey Donstan, in tail male ; with remainder to the use of the first and other daughters of Starkey Donstan, in tail general. Remainder to the use of George Huthwaite, the eldest son of John Huthwaite, and his assigns for his life ; with remainder to the use of trustees, to preserve contingent remainders ; with remainder to the use of the first and other sons of George Huthwaite, in tail male ; with remainder to the use of the first and other daughters of George Huthwaite, in tail general. Remainder to the use of Stokeham Huthwaite, (therein described as) second son of John Huthwaite, and his assigns for his life ; with remainder to the use of trustees, to preserve contingent remainders ; with remainder to the use of the first and other sons of Stokeham Huthwaite, in tail male ; with remainder to the use of the first and other daughters of Stokeham Huthwaite, in tail general. *Remainder to the use of John Huthwaite, (therein described as) the [307
third son of the said John Huthwaite, and his assigns, for his life ; with remainder to the use of trustees, to preserve contingent remainders ; with remainder to the use of the first and other sons of John Huthwaite, in tail male ; with remainder to the use of the first and other daughters of John Huthwaite, in tail general. Then followed other limitations, first to Cornelius, (the youngest son of John Huthwaite, the father,) for life and his issue in tail, and then to

several other relations of the testator, in like manner to them for life respectively; with remainder to their respective issue in tail, with an ultimate remainder to the use of the testator's own right heirs. *Starkey Donstan*, at the date of the will, was the nearest relation of the testator on his father's side. The sons of *John Huthwaite*, were the next nearest relations on the same side.

The testator died in 1784: *Starkey Donstan*, died without issue in the life time of the testator. Upon the death of the testator, *George Huthwaite*, entered upon the premises under the will, and died without issue, in 1817. *John Huthwaite*, was in fact the second son of *John Huthwaite*, the father. He died in 1788, leaving issue. *Keturah Mary*, the wife of *Simon Francois Le Chevalier*, and one of the lessors of the plaintiff.

Stokeham Huthwaite, was in fact the third son of *John Huthwaite*, the father. He died a few years since, leaving children, of which *Stokeham Huthwaite*, one of the defendants was the eldest.

Stokeham Huthwaite, the defendant claimed the property in question, under the will of the testator, and the other defendant held it under him, and adversely to the plaintiff.

Keturah Mary Le Chevalier, was the heir at law of *George Donstan*, the testator.

The question for the opinion of the court was,—

*308] *Whether the plaintiff was entitled to recover. If the court should be of opinion that he was, then a verdict was to be entered up for him, if not for the defendants.

Copley, Serjt., for the lessor of the plaintiff. There are two questions to be considered; first, whether *John Huthwaite*, and his issue, or *Stokeham Huthwaite*, and his issue, are to have priority under this will; and secondly, whether the heir of the testator, in consequence of the uncertainty of the will, is entitled to any estate. The intention of the testator is clear; he intended that the second son should take on the death of the elder son without issue; and that the third son should take on the death of the second son without issue, and in that event only. In order to ascertain which of them the testator intended to take first, the names of the parties and their description, that is, as to the situation in which they stood in point of seniority, are the material circumstances which require consideration. It then becomes a question, whether it is not more probable that the testator should be mistaken in the name, than in the order of seniority in which the parties stood. The two things are not to be reconciled, one must prevail, and that is to be adopted, which will effectuate the intention of the will. The testator could not have mistaken the order of succession, and although it is not very easy to account for his having mistaken the name, yet, among so many devisees, it is very probable he might have done so; much more so, than that he should have mistaken the order of seniority. The probability contended for is increased, when the regulations and dispositions of the whole will are considered together; and the courts have invariably collected the intention of a testator where ambiguity exists, not from a particular clause, but from considering the whole of the will, and collecting from it the principle, by which the testator was actuated. In *Thomas dem.*

*309] *Evans v. Thomas*, 6 T. R. 671, the testator devised to his "grand-daughter *Mary Thomas*, of *Llechllloyd*, in *Merthyr* parish." The testator had a grand-daughter of the name of *Elinor Evans*, who lived at *Llechllloyd*, in *Merthyr* parish, and a great grand-daughter, *Mary Thomas*, an infant, the only person of that name in the family, and she lived at some distance from *Merthyr* parish, and had never been there. The court did not support the devise to *Mary Thomas*, although by name she was distinctly pointed out. In *Pitcairne v. Brase*, Finch. Rep. 403, the devise was to "*William Pitcairne*, eldest son of *Charles Pitcairne*," the name of the eldest son was *Andrew*, and yet this was decreed a good devise to the eldest son. So also in an *Anonymous* case, 3 Leon. 18, it is said by *Weston*, J., "if lands be devised to *A.*, eldest son of

B., although that his name be *W.*, yet the devise to him is good, because there is sufficient certainty." In *Smith v. Coney*, 6 Ves. 42, the devise was to "the Reverend *Charles Smith*, of *Stapleford, Tawney*, in the county of *Essex*, clerk." *Richard Smith*, who answered the description, except in name, was decreed to be entitled. These cases all show that if other circumstances in the will indicate an intention that a particular party should take, a mere error in the name will be overlooked by the courts, and the party will be allowed to take although misnamed. Here it is evident upon looking at the whole will, that the testator intended the property to devolve to the devisees according to their seniority; and, as it appears, that the courts have not considered the mere name sufficient to entitle the party to take, the whole difficulty of the case is solved. If there were any doubt, the heir at law must take, for it is clear, that neither *Cornelius *Huthwaite*, nor his issue can take, while *John*, or *Stokeham*, or their issue are living. [*310

Lens, Serjt., *contra*. There is no ambiguity in this will, and no such difficulties exist here, as occurred in the cases which have been cited. The question is, whether the court will reject the description of a party rightly named, because one part of it is incorrect, *viz.* in being described as the second son. It is very possible, that *Stokeham Huthwaite* may have been the object of selection from personal affection; there is no circumstance to disprove such conjecture; and, although in the other parts of the will, the testator has attended to the seniority of the parties, it is not to be presumed, that he did not intend to break that order in this instance. The names of all the brothers are correctly stated in the will, and very strong grounds must exist to induce the court to depart from its usual course. In *Thomas v. Thomas*, there were very strong grounds for supposing that the mistake of the testator was in the name. But, supposing the devise to *Stokeham Huthwaite*, to be set aside, it is impossible to substitute his brother. In *Beaumont v. Fell*, 2 P. Wms. 141, the mistake in the name was not made a ground to substitute any other person. To make *Pitcairne v. Brase*, analogous to the present case, it would be necessary that there should be two sons of the name of *Andrew*, and so in the *Anonymous* case which has been cited, there should have been another person claiming whose name was correct. In *Smith v. Coney*, there was evidently a mistake in the Christian name. In this case there is no such mistake. In *Thrower v. Whetstone*, Dyer, 118, b. it is said, that "if an obligation is made to *T. S.*, son and heir of *G. S.*, when in truth he is a bastard, or as the *book [9 E. 4. 29. b.] is, if a woman be bound by the name of *Alice, S.*, [*311 wife of *T. S.*, and in truth she was a widow, or *contra*, if she be called a widow while she is a feme covert, &c. the words are only nugatory." In *Lord Evers v. Strickland*, Buls. 21, it is said, "that where a thing is so granted unto one, by such a name, as that he cannot be intended to be another person, this is good." Here the devise can apply but to *Stokeham Huthwaite*. His description by name is correct, and there is no other person of that name. A part of the description being incorrect will not prevent the party from taking. In *Comyns' Digest*, Devise, 1, there is a devise to "*B. G.*, second son of my second brother, who is my god-son, and bears my father's name; *B. G.*, who was a god-son to the testatrix, the daughter of Sir *B. G.* took, although he was second son of the second son of the second brother of the testatrix." But the heir cannot in any way be entitled; for, supposing the devisees to *Stokeham* and *John*, to be set aside, the devise to *Cornelius*, will be accelerated; if there be no intermediate devisee ascertained, the next in remainder will become entitled. For this, he cited *Fuller v. Fuller*. Cro. Eliz. 422.

Copley, Serjt., in reply. This case is to be distinguished from all those which have been cited. Here, the name and description are inconsistent, it is impossible to reconcile them, and one must be rejected; in deciding which should prevail, the description rather than the name should be attended to, as the mistake was more likely to occur in the former than in the latter. The authorities

relied on by the defendants are inapplicable to this case. In *Thrower v. Whetstone*, the name was right, but the description being incorrect *and not
 *312] applying to any one, was of course rejected. And, in the case of a bond being made to an illegitimate son, who was rightly named, but misdescribed as son and heir of *G. S.*, there was no person answering such description, and it was therefore rejected. So also, where the widow was bound as the wife of *J. S.*, there being no such person, the description was considered surplusage. But here, there is a person to answer the description, the devise is to the second son, and *John Huthwaite*, as such, is entitled to take. It cannot be considered, that *Stokeham Huthwaite*, was selected by the testator as a peculiar object of his bounty, as the devise to him was very remote, he not becoming entitled until the deaths of two preceding tenants for life, and the failure of their issue; it was in fact a family arrangement, and the testator clearly intended, that each party should take according to seniority. In *Bradwin v. Harper*, Amb. 374, the testatrix made a bequest to her niece *Mary* for life, and after her death, one moiety to be paid to the grand-children of *Mary*, and the other moiety to be paid to *Anne*, the daughter of *Mary*. *Mary* had two children, *Mary*, who never married, and *Anne*, who died before the testatrix, leaving two children. The court decreed, that one moiety should be paid to the children of *Anne*, notwithstanding the mistake in the description, it being clear that the testatrix so intended. In *Mosley v. Massey*, 8 East. 149. the court transposed the names of two counties, as it appeared on the face of the will, what was the intent of the testator, although he had mistaken the local situation of the lands. In all these cases the name was not allowed to prevail, neither should it in this case. There is a person rightly described, and he is
 *313] therefore entitled to take. As to the *devise to *Cornelius*, being accelerated, the cases cited are not applicable; the question is not whether *John* and *Stokeham*, shall or shall not take, but merely which of them shall have priority. *Fuller v. Fuller*, was a case of a lapsed devise. Either *John* or *Stokeham*, is clearly entitled, and as the description of the party ought to prevail, *John* is entitled to take first.

Lens observed, that in the cases of *Bradwin v. Harper*, and *Mosley v. Massey*, the intention of the testator could not be mistaken, and that they did not strictly apply; besides, that there was no instance in which the court had declared void, a devise to a party by his right name, merely because his relationship to the testator was more remote than the will stated it to be.

Cur. adv. vult.

GIBBS, C. J., now delivered the judgment of the court. This case arose out of a devise to *Stokeham Huthwaite*, considered with reference to another devise to *John Huthwaite*, under the will of *George Donston*. (Here his lordship recapitulated the facts of the case.) It is unnecessary to advert particularly to the respective claims of the parties, as the only question for the consideration of the court turns on the two devises to *Stokeham* and *John Huthwaite*. It is clear, that both *Stokeham* and *John Huthwaite* were intended to take as devisees under the will, and the only question is as to their priority. *Stokeham Huthwaite* is rightly named in the will, but erroneously described as being the second son, that description being applicable to *John Huthwaite*. It is a well known maxim of law, that "*Veritas nominis tollit errorem demonstrationis.*" To apply this maxim, however, it must be clear, that the devisor meant the person named; for if it be proved, that, by mistake, the party was wrongly named, the description will prevail over the name. In *Smith v. Coney*,
 *314] the description prevailed against the name, because the court thought the testatrix meant the person to whom the description, and not the name applied. Here there is nothing to show that *Stokeham Huthwaite* was not the person intended to take, though the testator gave him the erroneous description of second son; he might have known both *Stokeham* and *John*.

personally, and yet have mistaken the order of their seniority. All the other limitations in the will are accordingly to seniority, but we cannot be certain that the testator intended this principle to apply with regard to *Stokeham* and *John Huthwaite*, or that he did not mention *Stokeham* before *John*, from personal considerations. It has been contended, that if *John* is not to take under the true description, both these devises are void. If the description were such as to convince the court that the person named could not be the person intended, or if it were doubtful, then such consequence might follow; but, in the present case, we think that the error in describing *Stokeham* as the second son, does not show that he was not intended to take in the order in which he is named in the will. We are, therefore, of opinion, that *Stokeham Huthwaite* is entitled.

Judgment for the defendants.†

† [This case was turned into a special verdict, and removed into the Court of King's Bench, by a writ of error. That court awarded a *venire de novo*, that the jury might inquire whether the mistake was in the name or in the description; whereupon the defendants (conceiving that the Court of K. B. had exceeded their authority) brought a writ of error in the House of Lords. See 3 Barn. & Ald. 632. 2 Moore 325. *note*.]

*YOUNG v. TAYLOR.

[*315

[2 Moore 326. S. C.]

The plaintiff, a lessee, assigned his term to the defendant, who thereupon gave to the plaintiff a bond to indemnify him against the rent and covenants in the lease. The bond was forfeited; the defendant afterwards became bankrupt, and the assignee accepted the lease: Held, that the plaintiff could recover on the bond, as he had not actually made any payment before the bankruptcy, and was therefore, unable to prove under the commission; and as the court considered the statute 49 G. 3. c. 121. s. 19., not to apply to collateral securities, or to an assignee, but to be confined to the case of a lessee.

DEBT on bond. The declaration set out the condition by which (after reciting that by lease, dated the 30th of *September*, 1814, *Christopher Wilson* demised to the plaintiff certain premises, for the term of fifteen years, wanting seven days, at the yearly rent of 200*l.*, and subject to the covenants therein contained; and that the plaintiff had, by indenture, bearing even date with the bond, assigned to the defendant and *George Jarman*, the lease, and premises thereby demised, for the residue of the term, subject to the rent and covenants in the lease reserved and contained) it was declared, that "if the defendant and *Jarman*, or either of them, or either of their heirs, executors, administrators, or assigns, did and should, from time to time, and at all times thereafter, during the residue then to come and unexpired of the said term of fifteen years, wanting seven days, by the said indenture of lease granted, well and truly pay or cause to be paid, the rent, and observe, perform, fulfil, and keep the covenants, provisions, and agreements reserved, expressed, and contained by and in the said indenture of lease, and which, on the tenant's or lessee's part, were and ought from thenceforth to be paid, observed, performed, fulfilled, and kept; and also did and should well and sufficiently save, defend, keep harmless and indemnified the plaintiff, his heirs, executors, and administrators, and every of them, of, from, and *against all and all manner of action and actions, suit and suits, costs, charges, damages, and expenses whatsoever, which should or [*316 might be brought against him or them, or which he or they should or might sustain, expend, or be put unto, for or on account or by reason or means of the

non-payment of the said rent, or the breach, non-observance, or non-performance of the said covenants, provisoes, and agreements, or any of them, then the said obligation was to be void and of no effect."

The breaches assigned were, *first*, that the plaintiff and *Jarman*, on the 21st of *October*, 1817, suffered and permitted the sum of 210*l.* of the rent to remain due and unpaid to *Wilson*; and *secondly*, that they had not indemnified the plaintiff from all actions, &c.; but, on the contrary, that although an action was brought against the plaintiff by *Wilson*, for the recovery of the said sum of 210*l.* of the said rent, then due and unpaid from the defendant and *Jarman* to *Wilson*, in respect of the premises demised by the said lease; and although they were requested by the plaintiff to pay to him the amount of the costs and charges which he had incurred by reason of the said action, yet they had not paid to the plaintiff the costs and charges so incurred by him, or any part thereof.

The defendant pleaded *first*, *non est factum*; *secondly*, his bankruptcy generally; *thirdly*, a plea founded on the 49 *Geo. 3. c. 121. s. 19.*, stating the bankruptcy of the defendant and *Jarman*, and the acceptance of the lease by the assignee before the rent sued for became due, and before the commencement of the action against the plaintiff by *Wilson*; *fourthly*, a similar plea, stating the payment of the rent, and indemnity of the plaintiff against all actions, up to *317] the time of the acceptance of the lease by the assignee; and *lastly*, that the defendant and *Jarman* had duly obtained their certificates; that before they became bankrupts, the rent was in arrear, and that the assignee had since accepted the lease as part of their estate and effects. General demurrer to the last four pleas, and joinder. The cause came on for argument on a former day in this term, and,

Vaughan, Serjt., for the plaintiff, stated, that the question was, whether this bond could have been proved under the commission. It was a mere contingent debt, and could not, therefore, be considered as a debt, proveable under the commission. Even a forfeited bond, if the party be not damnified, is not proveable. In *Goddard v. Vanderheyden*, 3 *Wils.* 262, it was said by the court, "That if *A.* has a bond of indemnity from *B.*, and the condition be broken, and afterwards *B.* becomes bankrupt before *A.* has been sued or damnified, though *A.* had a good cause of action against *B.* before the act of bankruptcy, yet as *A.* had not been damnified, by paying any certain sum of money, by reason of *B.*'s breach of the condition, *A.* cannot possibly swear to any debt due and owing from *B.* at the time of the act of bankruptcy." If a lessee plough up meadow ground, for which he is bound to pay the lessor a certain sum, as a penalty, such penalty cannot be proved as a debt under a commission of bankrupt. So, if a man be bound to perform covenants, and the obligor, before he becomes a bankrupt, breaks them, the obligee cannot prove this a debt under a commission. Here, certainly, the bond was forfeited before the bankruptcy, by the defendant's

*318] suffering the rent to fall in arrear; but no demand was made upon the plaintiff until after the bankruptcy. In *Taylor v. Mills*, *Cowp.* 525, it was held, that a surety in a bond, who pays the debt after a commission of bankruptcy issued against his principal, is not barred by the certificate, though the penalty of the bond was forfeited before. And in the case of *The Overseers of St. Martin's in the Fields v. Warren*, 1 *B. & A.* 491, where the obligee in a bastardy bond, after the bond had been forfeited, became bankrupt, and obtained his certificate, it was held, that the parish officers were not thereby precluded from recovering upon the bond, for the expenses incurred subsequently to the bankruptcy. That case was decided, on the ground that it was a contingent debt; that the amount could not be proved under a commission, although many weeks' maintenance had actually been paid. The statute 49 *G. 3. c. 121. s. 19.*, applies only to a person who is entitled to a lease or to an agreement for a lease. It does not apply to the assignee of a lessee; it was founded on the hardship of a bankrupt lessee continuing liable to the covenants of his lease;

but this does not apply to an assignee. In *Auriol v. Mills*, 4 T. R. 94, it was held, that the bankruptcy of the lessee was no bar to an action of covenant brought against him. That was before the statute, but the statute applies to the case of the original lessee only, and the assignee must, therefore, continue liable, as before the statute. That it does not extend to the case of a surety, was decided in *Inglis v. M'Dougal*, 1 Moore, 196. *Welsh v. Welsh*, 4 M. & S. 333, turned on the eighth section of the statute, which permits a surety, who has paid after the commission, to prove, *and stand in the situation [*319] of the creditor, and does not apply to the present case. But, admitting that the statute does discharge the defendant from the covenants in his lease, yet it does not extend to collateral securities; to hold that it did, would defeat the very purpose of the parties in taking such securities. The plaintiff relies upon two grounds, *first*, that as this is not such a debt as could have been proved under the commission, the bankruptcy and certificate are no bar to the action; and *secondly*, that the nineteenth section of the statute is not applicable to this case.

Copley, Serjt., contra. The bond, in this case, was forfeited before the bankruptcy, and there was a clear existing debt proveable under the commission, and the bond being once proved, any future damnification that occurred might also be proved. In *Ex parte Cockshot*, Co. Bkt. Law, 161, the Lord Chancellor held, that where a bond has been forfeited at law before bankruptcy, the party was entitled to include all subsequent payments, and directed the petitioner, in that case, to be admitted a creditor accordingly. In *Martin v. Court*, 2 T. R. 640, it was held, that if *A.* be bound with *B.* as a surety for the payment of a sum certain, and take an absolute bond from *B.*, payable the day before the original bond will become due, and *B.* become a bankrupt before the day of payment, *A.* may prove this debt under the commission, and *B.*'s certificate will be a bar to an action by *A.*, on the counter bond, though *A.* do not pay the original bond till after *B.* has committed an act of bankruptcy. The amount of the injury sustained by the plaintiff was ascertained, and where a bond is given to perform certain *covenants at certain times, it may at least be proved to the amount of the breach incurred. In the case of [*320] *The Overseers of St. Martin in the Fields v. Warren*, the sums claimed by the plaintiffs had been paid subsequently to the bankruptcy. *Taylor v. Mills* was the mere case of a surety having paid after the bankruptcy. *Inglis v. M'Dougal* is also irrelevant. The question is, whether, where there has been an actual payment made before the bankruptcy, that is not an answer to an action. No other damnification is proved in the present case, nor does it follow that any other ever will arise. If the rent had been paid for the lessee on request, it would have been money paid to the use of the party, and proveable under the commission. The case of a security by bond is more favorable, and as it was forfeited before the bankruptcy, the debt is equally proveable. In the next place, this case is within the spirit, and within the precise terms of the statute, the object of which was, to exonerate the bankrupt from his liability under his lease, upon the acceptance by the assignees. Here the assignees have accepted it, and the defendant has, in effect, been sued for non-performance of the covenants of the lease; this is contrary to the spirit of the statute, as he ought now to stand discharged of all liability in respect of the lease. [*Gibbs, C. J.* This is an action upon a bond of indemnity, and not upon a covenant contained in the lease. The statute extends to covenants in leases only; besides, the defendant is an assignee, and the statute appears to me to apply to the case of a lessee only, and not to that of an assignee.] The clause of the statute is general, and cannot be confined, it extends to the non-observance or non-performance of the covenants by any one; and here, by reason of the non-performance of a stranger, the defendant is *called upon in respect of [*321] his bond; he is, therefore, sued by reason of the non-performance of the covenants contained in the lease, and his case is within the statute. *Hodgson*

v. Bell, 7 T. R. 97, is also an authority to show, that this debt might have been proved under the commission.

Vaughan, Serjt., in reply, observed, that the plaintiff was not damnified until after the bankruptcy; as he was not damnified by the rent being in arrear, but by the action brought by *Wilson*; and, therefore, according to *Goddard v. Vanderheyden*, the debt could not have been proved under the commission: and that this being a collateral security, could not be considered as within the clause of the statute as had been contended.

Cur. adv. vult.

GIBBS, C. J., now delivered the judgment of the court; and, after stating the pleadings, observed that the question in this case was, whether the causes of action stated in the declaration were or were not proveable under the commission against the defendant; for, if they were, the plaintiff could not maintain this action. His lordship then proceeded thus: The defendant gave a bond to the plaintiff, as well for the payment of rent, and performance of covenants, reserved by and contained in a lease assigned by him to the defendant, as also to indemnify the plaintiff from all actions and liability in respect of such rent and covenants. The plaintiff has assigned two breaches; first, that rent was in arrear, which the defendant had not paid. Secondly, that an action was

*322] brought by the lessor against the plaintiff, for the recovery *of the rent.

It does not appear, however, on the face of his declaration, but that that action is still depending; for although the plaintiff averred that it was brought, still it may not be concluded; and although he requested the defendant to pay the costs incurred by such action, still it did not appear that the plaintiff himself had paid such costs. At common law, this bond would have been forfeited; but that does not govern the question, for there are many cases where a bond is forfeited at law, yet the penalty cannot be proved under a commission of bankrupt. In the cases of *Toussaint v. Martinnant*, 2 T. R. 100, and *Martin v. Court*, 2 T. R. 640, the courts began to hold that the penalty might be proved under a commission, although the party had not actually made any payment; but that doctrine has since been corrected, in *Re Bowness* and *Padmore*,† and *Ex parte Brown*.‡ The principle upon which these cases have been decided, is precisely applicable to the present case, and is this; that, although an instrument executed by a bankrupt may be absolute, still, if it be only to secure him from a payment which should have been made by another, and such payment has not been made, it cannot be proveable under the commission. It has been insisted, that although the plaintiff might not be entitled to prove the debt under the commission, still that he was damnified, as an action had been brought against him for the recovery of the rent, by which costs had been incurred; we are of opinion that the costs, if any are yet incurred, are incident to the substantive claim. The cause is not yet decided; the plaintiff

*323] may not succeed, or may desert the cause, and the defendant *may ultimately recover them. We, therefore, think, that in the present state of the cause, the plaintiff could not prove these costs under the commission.

It was held at one time, in the Court of King's Bench,§ that in the case of a defendant nonsuited a plaintiff, and such plaintiff becoming bankrupt before taxation of costs, the costs might be proved under the commission: and in a case which underwent much consideration by *Eyre*, C. J.,|| and this court, they held it better to abide by the decision than to disturb it; but the doubts which *Eyre*, C. J., threw out were considered, and the Court of Chancery,¶ the Court of King's Bench,†† and this court,‡‡ have since held, that such costs

† *Co. Bkt. Laws*, 7th ed. 174, 5. *S. C. Whitmarsh's Bkt. Laws*, 2d ed. 293.

‡ *Ibid.*

§ *Hurst v. Mead*, 5 T. R. 365.

|| *Watts v. Hart*, 1 Bos. & Pull. 134.

¶ *Ex parte Hill*, 6 Ves. 656.

†† *Ex parte Charles*, 14 East, 197.

‡‡ *Walker v. Barnes*, Ante, v. 778. *S. C.* 1 *Marsh*. 346.

are not proveable under the commission. Costs have been held so much incident to the suit, that if there were a writ of error after the bankruptcy, to reverse a judgment against the bankrupt before, or a *scire facias* after bankruptcy to revive a judgment recovered before, these subsequent costs, though incurred long after bankruptcy, were also proveable under the commission, *Phillips v. Brown*, 6 T. R. 282. I mention these cases to show to what extent costs have been considered as incident to the original demand. These costs could not have been proved under the commission; and, as they could not have been so proved, we are of opinion that the plaintiff is entitled to recover.

The defendant has pleaded other pleas, founded on the 49 *Geo. 3. c. 121*. But this case cannot be brought *within either the eighth or nineteenth sections of that statute. The eighth section applies only to cases of [*324 sureties; the plaintiff is not a surety for the defendant, nor can he be liable for his debts, but merely on his own covenants; he is not, therefore, within this clause. And it is impossible that the defendant can, by any construction, be brought within the nineteenth section, which applies to a lessee only, who is thereby relieved, upon the acceptance of the lease by the assignees, from the liability which he would otherwise continue subject to, under his original covenant. We are, therefore, of opinion, that the pleas are bad, and that the plaintiff is entitled to recover.

Judgment for the plaintiff.†

† Judgment affirmed in error, 3 B. & A. 521.

*HILL v. DOBIE.

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[2 Moore 342. S. C.]

A release of an under-tenant, by the assignees of a bankrupt, does not amount to an acceptance by them of the original lease.

COVENANT. The plaintiff declared on an indenture, dated the 19th of December, 1809, whereby he demised the premises to the defendant for twenty-one years, at an annual rent of 80*l.*, payable quarterly. The defendant pleaded bankruptcy and acceptance of the lease by his assignees before the rent became due, upon which issue was joined. At the trial before Dallas, J., at Westminster, at the sittings after the last term, the following facts appeared. The defendant underlet the premises, in 1812, to one Griffiths for seven years; and in May, 1817, became a bankrupt. Shortly after the bankruptcy, Griffiths quitted the premises with the consent of the assignees, and by a deed dated the 24th of June, 1817, they released Griffiths from all liability during the residue of his term, for rent, or in respect of the covenants contained in the under lease. On the 4th of July, the assignees received a notice from the plaintiff, to elect whether they would accept the lease, upon which they immediately wrote to the plaintiff, positively refusing to accept it. This action was brought to recover 20*l.*, being one quarter's rent due on the 19th of September following. It was contended, that the interference of the assignees amounted to an acceptance of the lease, and that the defendant was consequently exonerated under the 49 *Geo. 3. c. 121, s. 19*. Dallas, J., directed a verdict for the plaintiff, with liberty to the defendant to move to set it aside, and enter it for himself, if the court should be of opinion, that the defendant was discharged.

*Copley, Serjt., on a former day in this term, had obtained a rule nisi accordingly.

Lens, Serjt., now showed cause, and contended, that the release of *Griffiths* could not be considered an acceptance of the original lease. The interest of the defendant was not in any way affected by this transaction between the assignees and *Griffiths*. They chose to exonerate him from his liability, and to determine the interest which he was possessed of as their tenant, but the original lease remained untouched, and they expressly stated by their letter, that they declined accepting it. He cited *Turner v. Richardson*, 7 East, 335, and *Wheeler v. Bramah*, 3 Campb. 340.

Copley, Serjt., in support of the rule, submitted that the subsequent conduct of the assignees must be left out of consideration. The question is, whether their extinguishment of the under lease did not amount to an acceptance of the lease; if it did, their subsequent refusal could have no effect. Having once made their election, they could not afterwards alter it. Lord *Ellenborough* in *Turner v. Richardson*, says, if the assignees elect to take the property, they cannot afterwards renounce it, because it turns out to be a bad bargain. If the assignees of a term of twenty years were let for six months only, that would be a clear election. So it is, if they take upon themselves to discharge a lessee. Here, they released the tenant in possession, and thereby acknowledged their acceptance of the interest of the defendant. They exercised a dominion over the property, and having done so, they could not afterwards renounce the ownership.

*327] *DALLAS, J. The single question is, whether the assignees have accepted the lease in question, as part of the bankrupt's estate and effects. They released the under-tenant, but that circumstance leaves wholly untouched the question of electing to take the original lease; they afterwards did elect, not to accept it, and I, therefore, think the plaintiff entitled to retain his verdict.

PARK, J. This case steers clear of all former decisions. It certainly can never be contended, that assignees having made their election, may afterwards renounce; but here, they never did elect to accept the lease; on the contrary, they rejected it. In *Hanson v. Stevenson*, 1 B. & A. 303, the court held, that the assignees had accepted the lease, but it proceeded there, on the express ground of their having intermeddled and managed the property.

BURROUGH, J. The assignees in this case had nothing to do with the original lease; they dealt with a derivative lease only, and the defendant is not discharged from his liability.

Rule discharged.†

† *Gibbs*, C. J., was absent.

STEVENS v. PINNEY.

[2 Moore 349. S. C.]

In an action on the common counts for work and labor, held, that the plaintiff, having established his case by other evidence, was not precluded from recovering by the defendant's proving the existence of an unstamped and unsigned agreement, which fixed the price, and which the defendant did not give notice to the plaintiff to produce.

ASSUMPSIT, to recover the sum of 36*l.* 11*s.* 2*d.*, being the balance claimed by the plaintiff to be due to him for plastering two houses. The declaration

*contained the common counts for work, labor and materials; goods sold and delivered; and the money counts. Plea, *non-assumpsit*, as to a part; and a tender of 15*l.* being the residue. At the trial before *Burrough*, J., at the sittings after the last term at *Westminster*, the witnesses for the plaintiff denied the existence of any written contract; but the clerk of the defendant, on being called for him, swore that the plaintiff, before he began the work, left a memorandum at the defendant's house, stating that he would perform it for 130*l.*; and that a few days after he met the defendant, and told him that if he did not approve of the estimate, he would allow 30*l. per cent.* for ready money, upon a bill for the work by measurement; and that the parties agreed finally upon 105*l.* The memorandum was neither stamped nor signed. It was objected, on the part of the defendant, that as there was a written contract, the plaintiff was bound to produce it in evidence; but *Burrough*, J., considering that the plaintiff was not bound to produce it, being neither stamped nor signed, the jury found for the plaintiff.

Lens, Serjt., on a former day in this term, obtained a rule *nisi* to set aside the verdict and have a new trial, and cited *Brewer v. Palmer*, 3 Esp. Rep. 213.

Copley, Serjt., now showed cause, and insisted that as the case for the plaintiff had been fully made out, he was entitled to recover. The defendant called a witness, who stated that there was some proposal in writing, but it was not stamped or signed; and as the plaintiff had no notice to produce it, the defendant was not at liberty to make use of it for any purpose whatever. It was for the *plaintiff to make out his case, independent of the agreement; and that he did. In *Doe, dem. Wood, v. Morris*, 12 East, 237, it was [*329] held, that in ejectment a landlord, having proved payment of rent by the defendant, and half a years' notice to quit given to him, could not be turned round by his witness proving, on cross-examination, that an agreement relative to the land in question was produced at a former trial between the same parties, and was, on the morning of the then trial, seen in the hands of the plaintiff's attorney; the contents of which the witness did not know, no notice having been giving by the defendant to produce that paper. Here the paper was not in the possession of the plaintiff; but if it had been, he would not have been bound to produce it, as no notice for that purpose was given by the defendant.

Lens, in support of the rule, urged that, as soon as it appeared on the trial that there was a written agreement, at that instant the plaintiff ought necessarily to have been nonsuited. It makes no difference whether the fact appears in evidence in the testimony of one side or the other; if there was a written agreement, the plaintiff ought to have made it a part of his case. There was no necessity to have it read; indeed it could not have been read, as it was unstamped; but to prove its existence alone was sufficient. Here, there is better evidence in writing of an agreement, which the plaintiff does not produce; and he cannot, therefore, maintain this action. The case of *Doe, dem. Wood, v. Morris* is distinguishable from the present case: there the witness did not know the contents of the paper; but here the contract was well known.

DALLAS, J. It is clear, that if it had appeared as part of the plaintiff's case that there was an agreement in *writing regulating the price and terms of the work to be performed, he must have produced it; and when [*330] produced, it could not have been received in evidence, being unstamped; and the plaintiff then must have been nonsuited. The plaintiff, however, had made out his case; but it appeared, in the course of the evidence of one of the witnesses for the defendant, that there was a written agreement. Now in proving the existence of the written agreement, it turned out to be unstamped, and, therefore, inadmissible in evidence, and, consequently, not amounting to an agreement; the evidence only goes to show that a paper, not properly stamped, is in existence. Besides, no notice was given to the plaintiff to produce it. In *Doe, dem. Wood, v. Morris*. Lord *Ellenborough* observed, "that if there

were any writing relative to the holding in the possession of the landlord, the defendant ought to have given him a regular notice to produce it; otherwise, in a collateral way, he would get the whole benefit of it without giving such a notice, when, if notice had been given, and the paper were produced, it might not support the objection." Here, it was necessary to show that it was an existing agreement at the time, and it was necessary to give notice to the party to produce it; and though I am not so confident on the latter point as on the former, yet, on the whole, I am of opinion that the objection cannot be supported.

PARK, J. I am of the same opinion. It would be in effect to repeal the stamp act to attend to this objection; besides, we can in no case get at the contents and substance of any agreement, unless it be stamped. This was not, in fact, an existing agreement.

BURROUGH, J. If this agreement had been part of the plaintiff's case, he *331] must have produced it stamped; *but here he proves his case by regular steps, independently of any agreement. It was necessary for the defendant, in impugning the plaintiff's case, to have given notice to produce it, and then to have given it in evidence, if produced; or, if withheld, to have offered secondary evidence of its contents. The subsequent evidence, however, proved that it was unstamped; and I concur with the court in opinion that the plaintiff is entitled to retain his verdict.

Rule discharged.†

† Gibbs, C. J., was absent.

END OF EASTER TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
TRINITY TERM,
IN THE
FIFTY-EIGHTH YEAR OF THE REIGN OF GEORGE III, 1818.

COORE, Demandant; SPRAGG, Tenant; BLACKBURN, et ux.,
Vouchees.

Recovery amended by substituting the words "advowson of the church" for the word
"rectory."

BEST, Serjt., moved to amend a recovery, by striking out the word "rectory,"
and inserting the words "advowson of the church" of *Great Holland*; the
deed to make the tenant to the *præcipe* having the latter words, and there being
an affidavit that the advowson and not the rectory was intended to pass.

Per curiam.

Fiat.

*G. DOUGLAS and ANN his Wife, Conusors.

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The court refused to pass a fine where the christian name of one of the parties was written on an erasure in the acknowledgment which was taken abroad, there being no affidavit describing in what stage of the proceeding the alteration was made.

PELL, Serjt., moved that this fine, the acknowledgment of which had been
(170)

taken in *America*, might pass, on an affidavit that the packet sealed in *America*, containing the documents, was not opened till brought into the presence of *Park, J.*, at chambers; when it appeared, that there had been an erasure on which the christian name of one of the parties was written. *Pell*, urged, that it was manifest that the erasure had not been made in this country, and that the rule as to erasures did not extend to acknowledgments taken abroad.

But, *Gibbs, C. J.*, read the form of the affidavit of erasures being made before the signature of the party or the commissioner, and said, "Supposing it to be true to demonstration, that no alteration has been made here, yet who can tell that the alteration was not improperly made in *America*?"

DALLAS, J. My brother *Pell*, has argued, that the rule touching erasures does not apply to acknowledgments taken abroad; I think the reason of the rule is fully as applicable to an acknowledgment taken abroad, as to an acknowledgment taken in this country.

Pell, took nothing by his motion.

•335] *WILMOT, Bart., Plaintiff; JOSEPH CLARKE and ELIZABETH his Wife, Deforciant.

Fine amended by inserting the words "one-fourth part" in conformity with the *dedimus* and deed to lead the uses.

COPLEY, Serjt., moved to amend this fine, stating, that the officers had a difficulty in passing it, as it did not agree with the *præcipe*. The *dedimus* was "of one-fourth part of fifteen acres;" the concord was "of fifteen acres;" and he prayed to insert the words "one-fourth part," in conformity to the *dedimus* and to the deed to lead the uses.

Per curiam.

Fiat.

NEWBALL v. ADAMS.

A motion in arrest of judgment must be founded on the *nisi prius* record, (which must be taken from the issue-roll,) and not on an apparent error in the copy of the declaration delivered.

BEST, Serjt., moved for a rule *nisi* to arrest the judgment in this action, which was tried before *Dallas, J.*, at the *London* sittings after *Easter* term last, upon an error in the declaration delivered to the defendant, urging that *that* was the issue delivered, and, in fact, the record.

GIBBS, C. J. The motion must be made on the record, not on the declaration delivered. The proceedings ought regularly to be entered on the issue-roll here, and the *nisi prius* record should be made up from it, that the court may see whether the party who has obtained the verdict is entitled to hold it. I have repeatedly known parties deluded by relying on the apparent error in the copy of the declaration delivered.

Per curiam.

Rule refused.

*THOMPSON and BARRAT, Assignees of SMYTH, a Bankrupt, v.
BRIDGES et al.

[2 Moore 376. S. C.]

In trover by the assignees of a bankrupt against the sheriff, for goods taken in execution by the latter, the declarations of the bankrupt previous to his bankruptcy having been admitted to show that the commission had been founded in a collusion between the bankrupt and the petitioning creditor, to create an apparent petitioning creditor's debt: Held, that the evidence was well received, though the petitioning creditor was not one of the assignees under the commission. By three judges, (*Gibbs, C. J., absent.*)

TROVER for goods taken by the defendants, as sheriff of *Middlesex*, in execution under a *fi. fa.*, dated the 27th of *November*, 1816. At the trial, before *Burrough, J.*, at the *Middlesex* sittings after the last term, the plaintiff proved the trading and the act of bankruptcy, early in *November*, 1816. He then proved the petitioning creditor's debt, by the production of the bankrupt's acceptance for 105*l.*, in favor of *Elvey*, the petitioning creditor. The counsel for the defendant stated, that he should show the transaction to be founded in fraud, and called a witness, who swore that the bankrupt informed him, previous to his bankruptcy, that he (the bankrupt) had lost a cause in the King's Bench; and that if a commission could be taken out against him, it would destroy the effect of the judgment in that action; that the bankrupt asked him whether any person could not be made bankrupt; to which the witness replied in the negative, unless there were a sufficient debt due by the person to be made bankrupt; whereupon the bankrupt said he did not owe 10*l.* to any man, and inquired of the witness, whether, if the witness were to draw a bill to be accepted by him (the bankrupt) the witness would become his creditor? Upon the refusal of the witness to draw such a bill, the bankrupt said he had a friend who would do it for him. This testimony was corroborated. For the plaintiff it was urged, that this evidence was inadmissible; but *Burrough, J.*, admitted it, stating, that he received it as evidence, for the purpose of showing that there was a scheme or contrivance to obtain a fraudulent commission. The learned judge told the jury *that the cause mainly turned upon the petitioning creditor's debt, and that if they should be of opinion that the bankrupt [*337 gave the acceptance proved, for the purpose of upholding the commission, then there would be no petitioning creditor's debt, observing, that, although the bankrupt could not be called to destroy the commission, yet he was of opinion, that the bankrupt's declarations were evidence to show, that the bankrupt and some other person had concerted the commission. The jury found a verdict for the defendants. And now,

Pell, Serjt., moved for a new trial, on the ground that, as the bankrupt could not so be called to prove that there was no petitioning creditor's debt (for no bankrupt shall be called to destroy his own commission), so neither could any declaration of his be received in evidence, save where the assignees were party to the fraud: and, granting that fraud had been proved in this case, it did not follow that the plaintiffs were privies to such fraud, so as to let in evidence of the bankrupt's declarations.

DALLAS, J.† There are many cases where the declarations of a bankrupt are admissible in evidence, and my brother *Pell* has principally rested his objection in this case, on the ground that the declarations of the bankrupt have been improperly received. But if the petitioning creditor's debt be founded in collusion, the commission fails, and the evidence received at the trial, went to show that such collusion had existed, and so, in my opinion, became part of

† *Gibbs, C. J.*, was absent.

the *res gesta*. I think that the evidence was properly admitted and left to the jury, and that they have come to a right conclusion on the case.

The rest of the court concurring, the rule was

Refused.†

† See *Taylor v. Kinloch*, 1 Stark. N. P. C. 175. *Brett v. Levett*, 13 East, 214.

*338] *WELCH et al. Assignees of KILSHAW, a Bankrupt, v. FISHER.

[2 Moore 378. S. C.]

A declaration in *assumpsit* stated in the first count that the plaintiffs were possessed of lands for the residue of three terms, which respectively commenced on the 15th of *February*, 1785; that they put them up to auction, subject to a condition that the purchaser should take the stock in trade at a valuation; that the defendant purchased the same, and that the stock was valued at a sum specified: breach, non-payment of that sum. The second count was for lands bargained and sold, and counts for goods sold and delivered; and the money counts were added. The leases under which the plaintiffs derived title, were dated *on* the day laid, *habendum* from the day of their date; and the valuation proved, after stating the prices of each article of stock, was indorsed with a memorandum, that certain pans were valued as sound, but should any of them prove broken the first time of boiling, an allowance was to be made thereon, and with that condition the stock was appraised at a certain sum, (the same as that laid in the declaration:) Held, that the statement of the day of commencement of the terms was immaterial; and that the valuation might be considered as *absolute*, as there was no proof of the pans being broken at the time mentioned.

ASSUMPSIT. The declaration in the first count stated, that the plaintiffs, as assignees, &c., were lawfully possessed of five several pieces of ground (subject to a mortgage thereon) in which the bankrupt carried on his business as a soap-manufacturer, for the residue of three terms of forty-one years, which respectively commenced on the 15th of *February*, 1785, and that the plaintiffs put up the said pieces of ground to public auction, subject to the following condition of sale, *viz.*, that the purchaser should take the stock in trade of the bankrupt as a tallow-chandler and soap-boiler, and all his utensils and implements of trade, both in and out of use, except the weighing-machine, at the valuation of two indifferent persons, one to be named by each party, or in case of a difference of opinion, then of an umpire, to be chosen by the arbitrators, "and to be paid for one-half in a month by a banker's bill at three months from that date, and the other half in a month by a promissory note, with a good surety, payable in
*339] six months from that date;" that the sale took place, and that the

defendant was declared to be the purchaser, and was let into possession. The declaration then contained mutual promises, and averred that the plaintiffs did, with the approbation of the defendant, appoint an arbitrator on their part, and the defendant one on his, to value the stock agreed to be taken, and that the stock, except the weighing-machine, was valued by the arbitrators at 892*l.* 6*s.* 4*d.* Breach, that although the defendant accepted the stock, and was requested by the plaintiffs to pay the said sum, yet that he would not pay the same or any part thereof, but wholly neglected so to do. The second count was for lands bargained and sold for the remainder of certain terms of years then to come and unexpired, and goods bargained and sold. Then followed a count for goods sold and delivered, and the money counts. Plea, general issue.

At the trial, before *Bayley, J.*, at the last *Lancaster* assizes, three leases, through which the plaintiffs derived their title to the premises, were given in evidence; they severally bore date the 15th of *February*, 1785, *habendum*

from the day of the date thereof, for the term of forty-one years thence next ensuing. To prove the value of the goods, the valuation was given in evidence, which after enumerating each article, and stating its price, was thus indorsed: "The pans under the shade are valued as sound; but should any of them prove broken the first time of boiling, the arbitrators agree to estimate the allowance to be made thereon: and, with that condition, the above stock and utensils are appraised by them at the value of 892*l.* 6*s.* 4*d.*" The periods for which the bill and note to be given in payment had to run, were elapsed before action brought. It was objected for the defendant, first, that the terms mentioned in the first count of the declaration, were averred to commence on the 15th of February, 1785; whereas the *habendum* in each lease was, "from the day of the date thereof:" *the commencement of the terms, therefore, should [340 have been averred to be on the 16th of February, 1785. Secondly, that the valuation as averred in the declaration was absolute, whereas, on its production in evidence, it appeared to be conditional: the plaintiffs, therefore, should have averred, that the pans under the shade, valued as sound, were not broken the first time of boiling. Bayley, J., overruled these objections, and the jury found a verdict for the plaintiffs, for 892*l.* 6*s.* 4*d.* Leave was given to the defendant to move to set this verdict aside. Accordingly,

Hullock, Serjt., in the last term, obtained a rule *nisi* to set aside this verdict, and enter a nonsuit on the grounds above stated. And now,

Lens, Serjt., showed cause against the rule. To the first objection two answers may be given, first, the allegation is only inducement describing certain leases, and so not fatal. Secondly, the word "from" may be construed either as exclusive or inclusive, *Pugh v. Duke of Leeds*, Cowp. 714. To allege that these leases commenced on the 15th of February, is a good and grammatical description, though the *habendum* of the leases is from the 15th of February; and, if the sense of any word be, in ordinary acceptation, ambiguous, it shall be construed according as the context and subject-matter require it to be, in order to make the whole consistent and sensible. *The King v. Stevens and Agnew*, 5 East, 244.

The second objection is equally untenable. The fact is, that the arbitrators valued absolutely, and, afterwards added that, if a certain occasion should arise, (which never has arisen,) a further deduction should be made. This does not make the valuation conditional. The indorsement of the memorandum is not a condition attached *to the past valuation, but only a direction what is to [341 be done in the case of a future contingency. There is, therefore, no variance between the contract as laid in the first count and the contract proved, and the case bears a strong resemblance to *Leeds v. Burrows*, 12 East, 1, and if the special count should fail, the general count for lands bargained and sold will lie and cure the defect.

Hullock, in support of his rule. The allegation of the commencement of the terms is substantive, and must be proved as laid. The allegation is, that the assignees put up for sale certain lands, the terms for years in which commenced on a certain day: if they do not put up for sale terms of years of such commencement, they do not prove their case as alleged. The question in *Pugh v. Duke of Leeds*, was a question of forfeiture, and in order to give effect to the instrument, *ut res magis valeat quam pereat*, the doctrine there held was allowed to prevail.

The second objection is fatal to the first count. The first count is for a positive specific sum. The estimate ought, therefore, to have been set out as framed, and there should have been an averment that the pans were tried and proved sound, that the valuation thereby became absolute, and that the plaintiff thereby became entitled to the sum. If this had been an award, it would have been bad for uncertainty. If the first count be defective, the other counts cannot be sustained.

GIBBS, C. J. We are of opinion, that there is no ground on which my

brother *Hullock's* rule can be supported. During a considerable part of the argument, the bearings of the case were not comprehended by the court, on account of the imperfect knowledge of the facts presented to us. We for some *342] time supposed *that this action was for the price of land, and we were fortified in this supposition by my brothers *Lens* and *Hullock*, who appeared to have both so conceived the case, and to have argued it on that conception. If this had been an action for the price of the land, it would make a difference whether the term commenced on the 15th or 16th of *January*; for, if the term commenced on the former day, there would be a longer residue for the vendee: but even if this had been an action for the price of land, I should have gone a long way in upholding the case of *Pugh v. The Duke of Leeds*, and I believe that the court were prepared to have decided this case upon that point. But, as the case stands, the statement of title to the lease is mere inducement; and the commencement of the term is of all things the most immaterial: it merely goes to show the origin of the term, in respect of which the plaintiff placed the articles in question on the premises.

But a second objection has been raised; and, if any of the pans had burst or become broken on the first time of boiling, this objection might have been decisive: but, the pans being sound, the qualification annexed is put out of the case, and is as nothing. In principle, this case is not unlike *Gladstone v. Neale*, 13 East, 410, where the contract proved, was a contract for *about* eight tons of hemp, and was averred as a contract for a large quantity, to wit, eight tons of hemp; and, according to my brother *Hullock's* doctrine, the contract should have been averred as for *about* eight tons. But the Court of King's Bench agreed with Lord *Ellenborough*, who held it well averred, as that quantity which it turned out to be before action brought, namely, eight tons. So here the price averred is, that price which it ultimately turns out to be. We are, therefore, of opinion, that neither objection can prevail, and that this rule must be

Discharged.

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*BURRETT v. BOOTY.

Where, on the separation of husband and wife, the husband by deed, absolutely transfers to trustees for the wife certain personal property, no longer to be liable to his interference; in an action against the husband for a debt subsequently contracted by the wife, the defendant must show that the trustees gave effect to the deed by taking possession.

ACTION against the defendant for his wife's lodging for one year. At the trial before *Dallas, J.*, (*London sittings after Easter term last*.) it appeared, that, in 1807, the defendant married his wife, who was possessed of considerable personal property, without making any settlement on her: that a separation had afterwards taken place, upon which occasion, the husband by deed, in consideration of 1000*l.*, expressed to be paid to him by the trustees for the wife, transferred to them in the fullest manner for the wife's separate use, all the property of which he had become possessed by the marriage: and the husband thereby covenanted not to interfere with that property; and the trustees of the wife covenanted with him, that he should not be asked by her for any allowance, nor be answerable for any of her debts; and that the wife should not sue the husband in the Ecclesiastical Court. The wife, in breach of her trustees' covenant, had, nevertheless afterwards, instituted a suit in the Ecclesiastical Court for restitution of conjugal rights, and had obtained judgment. It appeared, that, subsequently thereto, the husband had ill-treated the wife; and a second

separation had taken place, after which the plaintiff's demand accrued, by the wife having lodged in his house for a year. The plaintiff rested on the facts of the marriage, and the lodging. The defendant relied on the deed of separation. The jury found a verdict for the plaintiff.

And now,

Blosset, Serjt., moved, that a new trial be had, or a nonsuit entered. He urged that the case must be stripped of *the circumstance of the husband having cohabited with the wife after the deed of separation and separate maintenance, because that cohabitation took place in consequence of the sentence of the Ecclesiastical Court operating *in invitum*, under a suit instituted by the wife in breach of the covenant of her trustees, for which they might have been sued: so that the plaintiff could not avail himself of their re-union, but the parties must be considered as retaining the same situation in which they were placed by the deed of separation. He admitted, that where an allowance is covenanted to be made by the husband, it is incumbent on him to show that he has regularly paid it,† without which evidence, his defence to an action for the debt of the wife is imperfect; but, in *Turner v. Winter*,‡ where the husband had agreed to make an annual allowance, and had also paid it, it was held that the plaintiff could not recover. In *Nurse v. Craig*, 2 N. R. 148, the same doctrine was recognised by three of the judges, that the husband must show regular payment of the allowance; but he observed, that a settlement of an annual income to be paid out of the funds of a husband, and not paid, differed from the present case; for here, the whole property which was of the wife before marriage, was by one act absolutely conveyed to the trustees, after which, the husband had no further control over it, nor any further duty to discharge in respect thereof, but stood for ever absolved from his wife's debts.

GIBBS, C. J. Inasmuch as this property by marriage became the property of the husband in his own right, this deed was a settlement by the husband on the wife, as of his gift, out of that which was his absolute property, *(unless, indeed, the property consisted of choses in action, and those the husband might at his pleasure reduce into possession.) The question, therefore, is, whether there be any difference between the case of a continuing allowance, and an absolute gift of a large sum of money transferred, as this is, once for all, in the fullest words to the trustees of the wife. The defendant has not proceeded to show that the trustees took any possession of this property. If the husband does not take care that the trustees perform their part and pay the allowance, the wife is left destitute. I am of opinion, that the defendant has not gone far enough towards making out a case to support his motion.

Rule refused.

† *Ozard v. Darnford*. 1 Selw. N. P. 261, 4th edit.

‡ *Ibid*. 262.

THOMAS, assignee of EATON, a bankrupt, v. DA COSTA.

[2 Moore 386. S. C.]

A. agreed to consign goods to B. & C., foreign merchants, to be sold abroad on commission on his account, on which D. guaranteed that B. & C. should sell the goods to the best advantage. Before any transaction took place, C. ceased to be a partner with B., and D., residing in London, took C.'s place, under the firm of B. & Co. A. afterwards consigned goods to B. & Co. abroad, who remitted the proceeds to D., for the purpose of being handed over to A., who, in consequence, drew bills upon D., which he, by letter, agreed to accept, stating that he depended on A.'s promise to provide for them if remittances should not arrive from B. & Co. to meet them, and desiring that A. would write to him that the bills were drawn on account of A.'s consignments

to *B. & Co.* *A.* became bankrupt, previous to which *B. & Co.* had remitted to *D.*, directing him to pay *A.* on account of goods consigned by *A.*, which remittances were not received by *D.* till after the bankruptcy. *B. & Co.* afterwards sent other remittances with similar directions, with which *D.* credited the bankrupt in his account, and debited him with the acceptances given by *D.* to *A.* before his bankruptcy, but paid afterwards. In *assumpsit* by the assignee of *A.* to recover the last remittances from *D.*, who had applied them to the liquidation of his acceptances in favor of *A.*: Held, that he was not entitled to recover, on the ground of a specific appropriation of the proceeds of the goods consigned to *B. & Co.* before the bankruptcy, to provide for the acceptances so given to *A.* by *D.*

Assumpsit for money lent, paid, had and received, and on an account stated. There were two sets of counts, one laying the loan, &c. before the bankruptcy, *346] and one laying it after. Plea, *non-assumpsit*. There was notice of set-off. At the trial before *Dallas, J.*, (*London* sittings after *Michaelmas* term, 1815,) a verdict was found for the plaintiff for 632*l.* 14*s.* 1*d.*, subject to the opinion of the court on a case, of which the following is the substance.

Eaton the bankrupt, a manufacturer of and dealer in hosiery, at *Nottingham*, on the introduction of the defendant, agreed to consign goods to *Riatti & Co.*, of *Jamaica*, to be there sold on commission, on his account, upon which the defendant wrote the following letter with his signature, to the bankrupt, dated, *London*, the 20th of *June*, 1810.

"Should you be disposed to consign any of your manufactured goods to Mr. *Abraham Riatti* and Mr. *John Sadler*, of *Kingston, Jamaica*, on your account, with my knowledge and consent, I will guarantee that they shall follow your instructions, and sell your goods to the best advantage, and render you just account-sales; but it is also understood, that I do not guarantee any losses whatsoever, except such as may arise from insolvency or death of the said parties."

Before any of the transactions stated in the after-mentioned account took place, *Sadler*, had ceased to be a partner with *Riatti*; and the defendant had become a partner with *Riatti*, under the firm of *Riatti & Co.*

The bankrupt, until nearly the time of his bankruptcy, at different periods consigned goods to *Riatti & Co.*, under the letter of guarantee before stated, to be sold at *Jamaica*, on his account; and *Riatti & Co.* from time to time remitted the proceeds thereof to the defendant, for the purpose of being handed over to the bankrupt.

In consequence of these consignments and remittances, the bankrupt drew bills upon the defendant, which the latter agreed to accept on the terms contained in his *347] letter next mentioned, dated *London*, 1st of *February*, 1813, signed by him, and addressed to the bankrupt; the bankrupt engaging to provide for them when they became due, if the defendant should not, by that time, be in cash from the remittances made by *Riatti & Co.* on account of the said consignments.

"In answer to your letter of the 27th ult., I am agreeable to accept your bills drawn on me, say on your account, depending on your promise to provide for them in case remittances should not arrive from Messrs. *Riatti & Co.* to meet the same. It will be necessary for you to direct them to be presented to me, as I know not in whose hands they are; and, for regularity's sake, you will please write me, that the bills are drawn on account of your consignments to Messrs. *Riatti & Co.*."

On the 13th of *November*, 1814, *Riatti & Co.* sent from *Jamaica*, to the defendant several bills of exchange, directing him out of them to pay the bankrupt 235*l.* 14*s.* 4*d.* on account of the sales of the goods consigned by the bankrupt to *Riatti & Co.*, for sale on his account. These bills were not received by the defendant until after the bankruptcy of *Eaton*.

Eaton, committed an act of bankruptcy on the 23d of *November*, 1814, upon which the commission, under which the plaintiff was chosen assignee, was founded.

On the 1st of *January*, 1815, *Rietti & Co.* sent from *Jamaica*, to the defendant several bills of exchange, directed to him to pay out of them to the bankrupt 350*l.*, on account of the sales of the goods consigned by him to *Rietti & Co.* as aforesaid.

The defendant, being called upon for a statement of his transactions with the bankrupt, rendered a debtor and creditor account to the plaintiff, in which he debited the bankrupt with acceptances given by him to the bankrupt, and with interest and cash paid on his *account from the 25th of *March*, 1813, to the 15th of *November*, 1814, to the amount of 4709*l.* odd, and with [*348 600*l.* for an acceptance given by him to the bankrupt, and due on the 21st of *February*, 1815. In this account, he gave credit to the bankrupt for cash and remittances from the 1st of *April*, 1813, to the 14th of *December*, 1814, and for the sums of 235*l.* 14*s.* 4*d.* and 350*l.* stated to have been received respectively on the 10th of *February*, and 22d of *March*, 1815.

On the 28th of *April*, 1815, *Rietti & Co.* consigned to the defendant a quantity of dollars, by H. M. S. *Magnificent*, with instruction to deliver 200, being part thereof, to the bankrupt; of which consignment, *Rietti & Co.* advised the bankrupt by the following letter addressed to him, and dated *Kingston, Jamaica*, 28th of *April*, 1815.

“ Having 200 dollars in hand for you, arising from the sale of a few of your plain cotton and woollen hose, we have this day embarked them in H. M. S. *Magnificent*, included in our shipment to Mr. *Da Costa*, who has our instructions to deliver them to you; and, for which, you will credit us with 66*l.* 15*s.* 10*d.* currency, being with the expences included.”

The 200 dollars were, accordingly, received by the defendant in *July*, 1815; and, being sold by him, produced, after deducting the freight and charges, 46*l.* 19*s.* 9*d.*

The verdict was taken for the sums of 235*l.* 14*s.* 4*d.*, and 350*l.*, being the two last items on the credit side of the account, and 46*l.* 19*s.* 9*d.*, the value of the 200 dollars. The defendant claimed to debit the account, as against the plaintiff, with all the payments therein stated, as well subsequently as prior to the bankruptcy; such subsequent payments having been made in consequence of bills drawn by the bankrupt, and accepted by *the defendant previous [*349 to the bankruptcy, on the same terms and conditions as are specified in the defendant's letter, of the 1st of *February*, 1813.

The question for the opinion of the court was, whether the plaintiff was entitled to recover all, or any, and which of the three sums of 235*l.* 14*s.* 4*d.*, 350*l.* and 46*l.* 19*s.* 9*d.*, making together, the sum of 632*l.* 14*s.* 1*d.*, or any of them.

If the court should be of opinion, that the plaintiff was entitled to recover the above three sums or any of them, then the verdict to stand or be reduced accordingly. But, if the court should be of opinion, that the plaintiff was not entitled to recover either of the above three sums, then a nonsuit to be entered.

Best, Serjt., for the plaintiff. The verdict ought to be retained for all the three sums; at all events, the plaintiff is entitled to retain the two latter, for they were both remitted and received after the bankruptcy. This case may seem to be governed by *Olive v. Smith*, 5 Taunt. 56, but it is not within the scope of that decision, for, in *Olive v. Smith*, there was clearly a trust before the bankruptcy. But in this case there is nothing to show that any thing like a trust existed, on which mutual credit could be built; nor was there ever any thing to prevent the bankrupt from insisting on the property being delivered up. The defendant relied on the supposed ability and credit of the bankrupt. Lord *Hardwicke*, it is true, in *Ex parte Deeze*, 1 Atk. 229, says, “ it is hard, where a man has a debt due from a bankrupt, and has, at the same time, goods of a bankrupt in his hands, which cannot be got from him without the assistance of law or equity, that the assignees should take them from him without satisfying the whole debt;” but in the present *case there was nothing in the [*350 hands of the defendant, to get which out of his hands the plaintiff need

have recourse to any proceeding in law and equity. Here there is no trust to bring the present case within *French v. Fenn*; 1 Co. Bkpt. Law, 7th ed. 536, and it is even stronger than *Hervey v. Liddiard*, 1 Starkie, N. P. C. 123.

If the principle is extended beyond the case contemplated by stat. 5 G. 2. c. 30. s. 28., where mutual credit or mutual debts have existed before the bankruptcy, injustice will be done, and one creditor will receive an unfair preference. If the case of *Hervey v. Liddiard*, be law, the plaintiff is entitled to all three sums; if it be not law, he still will be entitled to the two last.

Vaughan, Serjt., for the defendant. This is a clear case of mutual credit within stat. 5 G. 2. If doubts should arise as to that proposition the case resolves itself into a case of specific appropriation. A guarantee is given by the defendant to the bankrupt before his bankruptcy, that goods to be sent by the bankrupt to *Riatti & Sadler*, shall be sold by them to the best advantage. Before any transaction on this guarantee, *Sadler*, quits the firm of *Riatti & Co.*, and the defendant, still residing in this country, enters into it. The bankrupt, before his bankruptcy, consigns goods to the house of *Riatti & Co.*, of which the defendant was then member, and the proceeds are sent by *Riatti & Co.*, to the defendant in this country, for the purpose of being handed over to the bankrupt. An arrangement is made that the bankrupt should draw on the defendant for such moneys as he wanted, and that the defendant should accept his bills. This the defendant did on an engagement on the part of the bankrupt, *351] that the proceeds of consignments should be, in the first place, applied to meet those bills. The defendant, by accepting those bills, engaged irrevocably that he would pay them; and the engagement on the part of the bankrupt is, that these goods, over which he had a control, are to be disposed of, and the proceeds, in the first place, applied to liquidate these bills, if remittances did not arrive from *Riatti & Co.* to meet them, and the surplus was to be passed to the bankrupt's account. In *Smith v. Hodson*, 4 T. R. 211, the defendant lent his acceptance to the bankrupts, on a bill which did not become due till after the bankruptcy, and was then outstanding in the hands of third persons; and yet it was held that the defendant, having paid the amount, after the commission issued, and before the action brought by the assignees, was entitled to set off the same as mutual credit under the statute. This case comes within the scope of *Olive v. Smith*, and is very similar to *French v. Fenn*. In the latter case the pearls were not sold, nor the proceeds received, till after the bankruptcy. Here the three sums stand on the same ground, and if this transaction forms a mutual trust before the bankruptcy, it matters not, though the goods were sold, and the sums were remitted after the bankruptcy.

Best, in reply, contended that no mutual trust existed before the bankruptcy. The goods were never in the defendant's power so as to enable him to defend with success an action by the bankrupt or his assignee for their recovery, nor could such a fact be found in the case even by a jury, much less by the court. He urged, that if the court decided with the defendant, they must overturn Lord *Ellenborough's* decision in *Hervey v. Liddiard*, and would carry the law of mutual credit much farther than it had been carried by *Mansfield*, C. J., in *Olive v. Smith*.

*352] *GIBBS*, C. J. My brother *Best* has informed us that we cannot decide this case in favor of the defendant without overruling the decision in *Hervey v. Liddiard*. The cases, I think, are not alike; nor have I any doubt that the defendant, in the present case, is entitled to the advantage which he claims. What are the facts of this case? Before his bankruptcy, *Eaton* was possessed of goods intended for a foreign market; and the defendant guaranteed that they should be sold to the best advantage, if they were consigned to the house of *Riatti & Co.*, then consisting of *Riatti & Sadler*. Pending this arrangement, and previous to any transaction under it, *Sadler* went out of the firm, and the defendant took his place. Here ended the defendant's guarantee contained in the letter of the 20th of June. When he entered the

firm the defendant became absolutely answerable to *Eaton*. We must look to the course of dealing between the parties for the terms on which these consignments were made. *Riatti & Co.*, having sold the goods consigned to them by *Eaton*, remitted the proceeds from time to time to the defendant, who handed over the same to *Eaton*. *Eaton* wanted money, and applied to the defendant for advances on the credit of the goods consigned to *Riatti & Co.* I say this from the terms of the following letter, addressed to *Eaton* by the defendant. "In answer to your letter of the 27th ult., I am agreeable to accept your bills drawn on me, say on your account, depending on your promise to provide for them, in case remittances should not arrive from *Riatti & Co.* to meet the same. It will be necessary for you to direct them to be presented to me, as I know not in whose hands they are; and, for regularity's sake, you will please to write to me that *the bills are drawn on account of your consignments to Messrs. Riatti & Co.*" I take this to be conclusive evidence of an undertaking on the part of *Eaton* that *the proceeds of the goods consigned to *Riatti & Co.* should be applied to the liquidation of the defendant's advances. [*353] The defendant has paid the bills drawn on him by *Eaton*, and the plaintiff now contends that he is entitled to recover out of the hands of the defendant the money applied by him to the liquidation of the bankrupt's acceptances, leaving the defendant entirely unpaid. We are of opinion that the plaintiff is not entitled to recover; for there was an engagement by *Eaton* that the proceeds of the goods consigned to *Riatti & Co.* should be applied to the liquidation of these acceptances, and the proceeds of these goods have been so applied.

DALLAS, J. By express agreement between *Eaton* and the defendant previous to the bankruptcy of the former, the proceeds of the goods consigned to *Riatti & Co.*, were to be applied in the first place to clear the acceptances given by the defendant to *Eaton*. This was a specific appropriation of those proceeds previous to the bankruptcy of *Eaton*; and, therefore, I am of opinion that the plaintiff is not entitled to recover.

PARK, J. The dates show that the letter of the 20th of June has no bearing on the present question, for no item in the account comes within the period when *Sadler* was one of the firm of *Riatti & Co.* I am of opinion that the present action is not maintainable, and that the judgment of the court in this case will not militate against any previous decision.

BURROUGH, J. I am clearly of opinion that this is a case of specific appropriation.

Judgment for the defendant.

*THORNTON et al. v. FAIRLIE, BONHAM, et al. [*354]

[2 Moore 397 S. C.]

P. was the owner of a ship which took in a cargo at *Calcutta*, to be carried thence to *St. Petersburg*, where P. resided. This cargo was purchased on account of P. by E., his supercargo and agent, but the house of F. F. & Co., of *Calcutta* advanced 25,000*l.* towards the purchase thereof, and of the cargo of another ship belonging to P., and, for their security, bills of lading of the first-mentioned cargo were signed by the captain, as shipped by F. F. & Co. on account of P., to be delivered at *St. Petersburg*, to the order of F. F. & Co., or their assigns. The words, "he or they paying freight," which, in the bills of lading, immediately followed the direction for delivering to the order of F. F. & Co. were struck out. These bills were delivered to F. F. & Co., and indorsed and transmitted by them to the defendants, their correspondents in *London*. Before the ship sailed from *Calcutta*, a memorandum for charter was entered into between E. and the captain, whereby it was agreed that the ship should be dispatched with a complete cargo, should proceed to *St. Petersburg*, and there deliver the same to the order

of the freighter on payment of freight at a specified rate. The ship, in the course of her voyage, was lost, but there was a salvage of part of the cargo, which was sold with the assent of the captain, and produced the net sum of 13,300*l*. In April, 1816, the defendants, as holders of the bills of lading, applied for the proceeds of the salvage, but the plaintiffs had put a stop thereon on the part of *P.*, and the captain, as agent of *P.*, claimed a lien thereupon for *pro rata* freight. On the 12th of July, 1816, the memorandum for charter not being then forthcoming, and the defendants being then in possession of the bills of lading, by letter to the plaintiffs, agreed that (in consideration of the plaintiffs handing to the defendants the captain's order in the defendants' favor for the proceeds of the cargo of his late ship, and a letter from the plaintiffs to those who had sold the cargo, withdrawing any claim on account of *P.*) the defendants would hold themselves accountable for the plaintiffs, as the agents of *P.*, for whatever might appear to be due for the *pro rata* freight, according to the charter-party entered into at *Calcutta* between *E.* and the captain. The plaintiffs performed their part of the agreement, and the defendants, in consequence, received the proceeds of the salvage, but refused to pay the *pro rata* freight:

Held, that the plaintiffs were entitled to recover in *assumpsit* on the agreement of July, 1816, the amount of the *pro rata* freight.

ASSUMPSIT. The declaration stated, that before the making of the agreement thereinafter mentioned, *Prehn* was owner of a ship called *The Patriarch*, where-
 *355] of *John Wrentmore* was master, and that the ship *had, at *Calcutta*, taken on board a cargo of goods, to be carried therein, in a voyage from thence to *St. Petersburg*, of which cargo the bills of lading had been indorsed to the defendants, and a charter-party for the ship in the voyage had been entered into between *Wrentmore* and *John Embrey*; that upon making the agreement, the ship, with the cargo on board, in the course of the voyage, had been wrecked and cast away on the coast of *Flanders*, and a great part of the cargo had been saved, and delivered into the possession of certain persons using the style and firm of Messrs. *De Les Cluze & Sons*, and that *Wrentmore* had a claim upon the cargo and the proceeds thereof, for certain freight, *pro rata*, which the ship was entitled to. The declaration then set out the agreement of the 12th of July, after mentioned, and averred, that although the plaintiffs handed over to the defendants *Wrentmore's* order, and the letter from the plaintiffs to Messrs. *De Les Cluze*, and that although the plaintiffs had produced to the defendants the charter-party, and the sum of 6000*l*. appeared to be due for the *pro rata* freight to which the ship was entitled, agreeable to the charter-party, and although the defendant had received the proceeds of the cargo, to the amount of 30,000*l*., and three months from their receiving the same had long expired, the defendants had never paid the 6000*l*. so due for *pro rata* freight.

The declaration contained other counts on the same agreement and the money counts. Plea, general issue. At the trial, before *Park, J.* (*London* sittings after *Hilary* term last) the jury found a verdict for the plaintiffs for 4622*l*., subject to the opinion of the court, upon a case, of which the following is the substance.

Prehn, who is a merchant resident at *St. Petersburg*, was owner of the ship *Patriarch*, which, in the year 1815, took in a cargo at *Calcutta*, to be
 *356] carried thence *to *St. Petersburg*, the ship being to touch at *Portsmouth* for orders. This cargo was purchased on account of *Prehn*, by *Embrey*, his supercargo and agent, but the house of *Fairlie, Ferguson, & Co.*, of *Calcutta*, advanced the sum of 26,000*l*. towards the purchase thereof, and of the cargo of another ship belonging to *Prehn*, and, for their security, bills of lading of the *Patriarch's* cargo were made out and signed by the captain, as "Shipped by *Fairlie, Ferguson, & Co.*, on account of *Prehn*," to be delivered at *St. Petersburg*, to the order of *Fairlie, Ferguson, & Co.*, or their assigns. The words "he or they paying freight," which, in the bill of lading, immediately followed the direction for delivering to the order of *Fairlie, Ferguson, & Co.*, were struck out of the bill of lading in the hands of the defendants, and also, out of the duplicate of the bill of lading in the hands of the plaintiffs. These bills of lading were delivered to *Fairlie, Ferguson, & Co.*, and indorsed and transmitted by them to the defendants, their correspondents in

London, carrying on trade under the firm of Messrs. *Fairlie, Bonham, & Co.* Before the ship sailed from *Calcutta*, a memorandum for charter was entered into between *Embrey*, the supercargo, acting on behalf of *Prehn* and *Wrentmore*, the captain of the *Patriarch*, whereby it was agreed that she should be dispatched with a complete cargo, consisting of sugar and cotton, proceed to *St. Petersburg*, and there deliver the same to the order of the freighter, on being paid freight, at a specified rate, for the entire cargo shipped at *Calcutta* on the vessel's arrival in *Russia*; one half on unloading and right delivery of the cargo in ready money, and the remainder on good and sufficient bills at two months, payable in *St. Petersburg*.

The ship, with the cargo on board, arrived at *Portsmouth* on the 15th of *March*, 1816, and sailed from thence "for *Antwerp* for orders, on the 18th of that month. On proceeding to *Antwerp*, she was, on the 20th [*357 of the same month, totally lost on the coast of *Flanders*. A part of the cargo, amounting to two hundred and twelve tons, was saved, and, with the assent of *Wrentmore*, taken possession of by Messrs. *De Les Cluze & Sons*, merchants at *Bruges*, who immediately sold the same for the net sum of 13,300*l.* In *April*, 1816, the defendants, as indorsees of the bills of lading, applied to Messrs. *De Les Cluze* for the proceeds of the salvage, but the plaintiffs had put a stop thereon on the part of *Prehn*; and *Wrentmore*, as *Prehn's* agent, claimed a lien thereupon for *pro rata* freight, for the part of the cargo saved.

On the 12th of *July*, 1816, the following agreement was entered into, in the form of a letter of that date, addressed by the defendants to the plaintiffs; the said instrument, entitled "Memorandum for charter," not being then forthcoming, and the defendants then being in possession of the bills of lading.

"In consideration of your handing to us captain *Wrentmore's* order in our favor for the payment of the proceeds of the cargo of his late ship *Patriarch*, and also a letter from yourselves to Messrs. *De Les Cluze & Sons*, withdrawing any claim on account of Mr. *Prehn* of *St. Petersburg*, we engage and agree to hold ourselves accountable to you as the agents of *C. L. Prehn*, Esquire, for the sum of 4252*l.*, or whatever may appear to be due for the *pro rata* freight the said ship is entitled to, agreeable to charter-party entered into at *Calcutta*, between Mr. *John Embrey* and Captain *Wrentmore*, which you engage to produce, and which freight Captain *Wrentmore* claims against such proceeds; and we also engage and agree to pay you the further sum of 3896*l.* 11*s.* 9*d.* being the difference between the amount of a bill of exchange for 25,033*l.* 8*s.* 3*d.*, drawn by Mr. *Embrey* on you, and another bill of exchange for *687*l.* 10*s.*, also drawn by Mr. *Embrey* on you, and the sum of [*358 30,000*l.*, insured by us on the said cargo, after deducting the costs of insurance; and we hereby agree to pay you the said sum of 4252*l.*, or such sum as may be due as aforesaid, also the further sum of 3896*l.* 11*s.* 9*d.* within three months from our receiving the said proceeds from Messrs. *De Les Cluze & Sons*, and the recovery of the insurance.

"Signed,
"Fairlie, Bonham & Co."

"P. S. It is hereby understood, that the sum of freight above mentioned will be paid to you within three months after our receiving the proceeds of the cargo, and the sum of 3,896*l.* 11*s.* 9*d.*, claimed for Mr. *Prehn*, within the same period after the insurance is recovered.

"Signed as above."

In pursuance of this agreement, the plaintiffs procured and handed over to the defendants, *Wrentmore's* order in their favor for the payment of the proceeds of the salvage of the cargo of the late ship *Patriarch*, of which the following is a copy:

"London, April 27th, 1816.

"Messrs. *De Les Cluze & Sons*,

"Gentlemen,

"You will please pay the proceeds of the cargo of the ship *Patriarch*, to Messrs. *Fairlie, Bonham & Co.*, or their order.

"I am, gentlemen,

"Your most obedient servant,

"*J. Wrentmore.*"

*359] "We hereby certify, that the above is the signature of captain *J. Wrentmore*, late of the ship *Patriarch*.

"London, 12th July, 1816.

"*R. and R. Thornton and West.*"

The plaintiffs also handed over to the defendants, a letter from the plaintiffs to Messrs. *De Les Cluze*, withdrawing any claim of *Prehn*.

By virtue of the above order and letter, the defendants on the 20th of July, 1816, received from Messrs. *De Les Cluze* the proceeds of the salvage, amounting to 13,300*l.*: the above instrument entitled "Memorandum for charter," was the only instrument in the nature of a charter-party, entered into at *Calcutta* between *Embrey and J. Wrentmore*. It was produced by the plaintiffs to the defendants, on the 5th of February, 1817, and the present action was brought on the 22d of May, 1817. According to the rate of freight specified in the said instrument, had the part of the cargo so saved been delivered at *St. Petersburg*, the freight thereupon would have amounted to 5102*l.* 8*s.*; the expense of forwarding the same from *Bruges* to *St. Petersburg* by another vessel, would have been 480*l.* 8*s.*, bearing the sum of 4622*l.* as the *pro rata* freight for carrying the goods from *Calcutta* to *Bruges*.

The question for the opinion of the court was, whether the action could be maintained. If the court should be of opinion that the action could be maintained, the verdict was to stand; otherwise a nonsuit was to be entered. And, in either event, the case was to be turned into a special verdict, if the court should so direct.

Copley, Serjt., for the plaintiffs, in the outset confined himself to a statement of the agreement, and the action which had been brought for the infringement of it.

*360] **Best*, Serjt., for the defendants. The plaintiffs are the agents of *Prehn* the owner, and if he cannot maintain the action, neither can they. The defendants represent *Fairlie, Ferguson & Co.* at *Calcutta*, the mortgagees of this cargo, purchased there by money borrowed from them by *Prehn*, and secured to them by *Prehn* by indorsement of the bills of lading. The words "he and they paying freight," are struck out of the bills of lading: the goods being consigned to the mortgagee, no freight is to be paid to *Prehn* the owner and mortgagor. But it is sought to make the mortgagee pay freight by means of the memorandum for charter, to which the defendants were not privy, the existence of which was not known to them, by which, in fact, *Prehn* is made to contract with himself, to pay himself freight; and which, consequently, is no charter-party, or *carta partita*, from the want of two contracting parties. On this point, therefore, the proof of the allegation in the declaration fails. Neither is the allegation, that *Wrentmore* had a claim upon *De Les Cluze* for his *pro rata* freight substantiated. Independently of the absurdity of freight being payable by an owner to himself, which is much the same as if *A.* should make a lease to himself, and then say that the rent was payable to himself, no freight was payable in this case. The goods were wrecked on the coast. *De Les Cluze*, without authority from the defendants, took to the goods saved, and sold them. The voyage was never performed according to the terms of the charter-party, and in such case, no freight arises *pro rata itineris*. [*Gibbs*, C. J.

That was decided in a case in which I was counsel;† and the previous case of *Hunter v. Prinsep*‡ is to the same effect.]

*Neither is there any consideration for the supposed contract which is a mere *nudum pactum*; for the mortgagees by the bargain made in *India*, were entitled to have the cargo brought to *England* for nothing, and the mere performance of an act which a man is bound to perform is no consideration, *Harris v. Watson*, Peake, N. P. C. 102, *Hilk v. Myrick*, 2 Campb. 317. The agreement is only to pay what is due, and none is due. Until the plaintiffs pay off the 26,000*l.*, the defendants have a right to the possession of the cargo.

Copley in reply. The defendants expressly stipulate to pay the difference between the bills drawn by *Embrey* on the plaintiffs, and the sum of 30,000*l.* insured by the defendants on the cargo after deducting the costs of insurance. The engagement is, for the defendants, to hold themselves accountable for the plaintiffs as the agents of *Prehn*. The nature of the instrument, and the defendants' knowledge that *Embrey* was supercargo, and that *Wrentmore* was his captain, appear on the face of the agreement. The relative situation of the parties, therefore, was well known to the defendants. The objection that there was only a "memorandum for charter," and no charter-party is of no weight. A dispute existed, and the parties entered into the agreement to avoid litigation in *Antwerp*; the existence of the dispute was a consideration for the agreement, of which the defendants have taken the benefit, and which they cannot now abandon, and it matters not what the previous rights of the parties might have been.

In the case of *Hunter v. Prinsep*, the master proceeded without orders from any of the parties concerned, but it *does not appear that the sale by *De Les Cluze* was without the consent of the parties concerned, and in the [362 absence of a statement to the contrary, their consent to the sale must be presumed. It cannot be said that the agreement was entered into in ignorance of what was done in *India*, and that the bills of lading were not then in the hands of the defendants, for those bills are stated to be in their possession.

GIBBS, C. J. This is an action by *Thorntons* and *West*, against *Fairlie* and three others, for not paying to the plaintiffs certain sums, which the plaintiffs say that the defendants by their agreement with the plaintiffs, undertook to pay to them, in consideration of the plaintiffs enabling the defendants to recover a larger sum of money; and the plaintiffs say, that the defendants contenting themselves with so much of the agreement as put a larger sum of money in their pocket, withdrew themselves and refused to pay the smaller sum. Many parts of the case are involved in obscurity, but those which relate to the agreement are involved in none. In the state of *Europe*, as it existed at the time of this transaction, we know how necessary it was, that the apparent owners of property on the seas, should hold it in trust for others; and we are likely, therefore, to find many agreements entered into at that time, which would have had no existence in another state of things. We find *Embrey*, the agent of *Prehn*, making a charter-party (for a charter-party it is,) with *Wrentmore* the captain of *Prehn's* ship, for carriage to *Europe* of certain goods at certain stipulated freight. We find also bills of lading signed for goods shipped by *Fairlie, Ferguson, & Co.*, on account of *Prehn*, deliverable to the order of *Fairlie, Bonham, & Co.*, of *London*, and the words "he or they paying freight," struck out. With what *might have been the beneficial interests of [363 parties in this cargo, we are not acquainted: but we know that the ship sailed, that she reached *Portsmouth*, sailed thence, was cast away, that a considerable salvage ensued, which got into the hands of *De Les Cluze*, and, both *Prehn* and the defendants making a claim, the plaintiffs put a stop on the defendants' interest, which prevented the defendants from receiving their claim.

† *Osgood v. Groning*, 2 Campb. 466.

‡ 10 East. 394. *Abbott on Shipping*, 334. 4th. ed.

The defendants might have contested their right at *Antwerp*, but, dreading that, they agree, that, on the plaintiffs' withdrawing all obstacles to their receiving the larger sum, they, the defendants, will pay a certain sum for freight, and they enter into an agreement which I proceed to state. It recites that, so early as *April*, 1816, the defendants had possession of the bills of lading. [Here, the learned judge read the agreement.] What do they engage to do? To pay 4,252/., or whatever may be due for the *pro rata* freight, according to the charter-party.

It does not look from this statement as if the defendants had much of which to complain; for, if they did advance 26,000/., they received 30,000/., out of which they were to pay a smaller sum; but I do not rest on that.

The case then is this: here is a property in the hands of *De Les Cluze*, on which *Prehn* and the defendants make claims. The defendants had, then, been for four months in possession of the bills of lading: they, therefore, knew their tide, and might have brought before a legal tribunal the grounds of the opposition made to their receiving the whole. They do not think fit so to do, but come, in preference, to this agreement. In order to remove those difficulties, the defendants purchase their removal by an engagement, if they were permitted to retain the whole, to pay a certain sum to the plaintiffs. The plaintiffs have done every thing which is contained in the agreement on their side.

*364] *Prehn's* claim is taken off, *Wrentmore's* claim is taken off, and the defendants receive the money from *De Les Cluze*. But, it is said, there was no *pro rata* freight due. This decision leaves that question untouched. The defendants might have contested that right; but, by this arrangement, they alter the state of things, and subject the question, if now material, to be decided by a different law. It is said that the defendants only agree to pay so much as, according to strict law, shall be due. I do not think that such is the construction of the contract: I think it clear, on the language of the agreement, that the parties, on what previous ground I know not, fully agreed among themselves that this was a case in which freight *pro rata* accrued; but, not having the charter-party with them, they could not exactly define the amount, though they guess it very nearly.

I, therefore, think that there was a good consideration for this agreement, and that the plaintiffs are entitled to recover.

The rest of the court concurred, and gave

Judgment for the plaintiffs.

Lens, Serjt., then applied to have the case turned into a special verdict. The court took time to consider the application, and, on a subsequent day, stated their opinion that there was no ground for granting it.

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RICHARD CRAFTS v. TRITTON.

[2 Moore 411. S. C.]

A. mortgaged an estate, his sole property to C., by an indenture in which B. joined A. in charging an estate, their joint property, as a further security; and A. and B. gave their joint bond for payment of the sum advanced. A. afterwards, by deed, to which B. was no party, sold the estate, his sole property, to D., who covenanted with A. to pay C. the sum advanced on mortgage to A., and to indemnify A. and B. from the payment of it. B. was called on by C. for payment of the principal and interest of the money lent on mortgage, which B. accordingly paid: Held, that B. was not entitled to recover this sum from D. in an action against him for money paid to his use.

ASSUMPSIT. The declaration contained counts for money lent, paid, had and
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received, with a count for interest. At the trial before *Graham, B.* (*Maidstone* spring assizes, 1818,) the following facts were given in evidence. By indenture of the 3d of *December*, 1808, made between *John Crafts*, the plaintiff, and *James Lasey*, *John Crafts* mortgaged an estate of which he was sole owner, to *Lasey* for 300*l.* for the term of six hundred years, and in the same indenture the plaintiff joined *John Crafts* in charging an estate, of which they were jointly seised, as a further security to *Lasey*. On the same day the plaintiff and *John Crafts* gave a joint bond to *Lasey*, conditioned for the payment of the 300*l.* and interest by *John Crafts*, and due performance of the covenants in the mortgage deed. By indenture of the 24th of *January*, 1812, made between *John Crafts* and the defendant, reciting the indenture of mortgage; that there was then due on the security 300*l.* only; that the defendant had contracted with *John Crafts* for the purchase of his estate for 325*l.*; and that it had been agreed that 25*l.* should be paid by the defendant to *John Crafts*, and the remaining 300*l.* to *Lasey* in discharge of the mortgage debt; *John Crafts* conveyed the estate to the defendant in fee, and the defendant covenanted with *John Crafts* to pay to *Lasey* the 300*l.*, and also to indemnify *John Crafts* and the plaintiff from the payment of the *same sum and interest. In the year 1817, the plaintiff, being called on by *Lasey* for the principal and interest then [366 due on the mortgage security, paid to him the sum of 308*l.* 8*s.* 10*d.*, in consequence of the defendant's inability to pay the same. For this sum the plaintiff brought the present action.

For the defendant it was urged, that this action was not maintainable, as the defendant should have been sued on his covenant of indemnity, on which alone he was liable. *Graham, B.*, was of opinion that the action could not be sustained, and directed a nonsuit, with liberty to the plaintiff to move to set it aside, and have a verdict entered. Accordingly,

Best, Serjt., having in the last term obtained a rule *nisi* to that effect,

Lens, Serjt., now showed cause against the rule. If there were no other remedy by which the plaintiff might be ultimately indemnified, the law might assist him with one, and enable him to bring his action for money paid. But the rule only applies where no other remedy exists, and cannot be brought to bear on this case, where there is a plain remedy on the covenant.

Best, in support of his rule. It will not be disputed that the defendant ought to pay the money sought to be recovered; and the most simple, most direct, and most convenient course is to permit the plaintiff, who ought not to have been called on to pay, but who has paid it, to recover in his form of action. If a remedy of a higher nature had been provided, this species of action would have been barred; but the plaintiff, who is no party to the deed containing the covenant to indemnify, is provided with no remedy of a higher nature, and the rule of exclusion has never been carried *further than to cases where the [367 plaintiff has himself such a remedy, as in *Toussaint v. Martinnant*, 2 T. R. 100. The reason of the thing does not extend to the case where one has the power to compel another to sue for him. Here the plaintiff, being no party to the deed, is not estopped, but left at large to take any remedy which the law gives him: if he had taken a higher security, it might have been construed into a sort of contract that he would take that remedy only which he had elected.

If it be urged that the plaintiff has paid voluntarily and without compulsion; the answer is, that he has paid under a liability. He was not bound to wait for an arrest, or to wait till he was sued, and had incurred costs, in the hopeless defence of an action for a sum which he knew he was bound to pay. The payment is, then, to all intents, a compulsory payment, and comes within the case of *Exall v. Partridge*, 8 T. R. 308, where a stranger, whose goods were distrained on the premises of another for rent arrear, was obliged to pay the rent to redeem them. Here the plaintiff has been compelled to pay money for the defendant, who, but for the plaintiff, must have paid it; the defendant is

thereby relieved from the payment, and reaps immediate advantage; the money, therefore, has been compulsorily paid by the plaintiff, strictly for the use of the defendant, who is liable to the plaintiff under the present form of action.

GIBBS, C. J. My brother *Best*, has argued this question with great ingenuity and perspicuity, and has given great effect to his argument, by confining himself absolutely to the material points of the case. I think it necessary to go through his propositions, in order to show where we agree with him and where we differ from him. In this case, originally, *Richard* and *John Crafts* *368] were sureties to *Lasey* for payment to him of the sum of 300*l.* by *John Crafts*, and two mortgages, (or rather a mortgage on an estate, the sole property of *John*, and on an estate the joint property of *Richard* and *John*.) were given. If *Richard* had paid, he would have paid as surety for *John*. Without deciding the point, I am much inclined to go thus far with my brother *Best*, in agreeing, that if *John* had merely transferred to *Tritton*, the defendant, his interest in the estate, which was subject to *John's* debt to *Lasey*, he would by his own conduct, have substituted *Tritton* for himself, and made *Richard* the surety for *Tritton*; and that, if *Richard* had been forced to pay, he would have paid as surety for *Tritton*, who ought to have paid. But this proposition is founded on the supposition that *John Crafts* placed *Tritton* precisely in his place, whereas this case is widely different. *Tritton* purchased from *John Crafts*; he might have taken his conveyance without any intercourse with *Lasey*, and if he had been inclined to deal with *Lasey*, he might have dealt with him on his own terms. But *Tritton* enters into a specific obligation by his purchase-deed: he is bound by that; and he confines himself to that specific liability, which he by his deed has created, namely, to a covenant by himself with *John Crafts*, on behalf of *John Crafts*, and also on behalf of *Richard Crafts*; and the only remedy to which *Richard Crafts* can have recourse, is an action by *John Crafts* upon that covenant. The rule must, therefore, be discharged.

Rule discharged.

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*HURRELL v. WINK.

[2 Moore. 417. S. C.]

Replevin. The defendant avowed the taking, as overseer of the poor, under stat. 43 *Eliz.* by virtue of a distress warrant for an aggregate sum due on seven several rates, six of which were confirmed on appeal, on the ground of the appellant not being in sufficient time, the other being then quashed by consent. It did not appear that any precise demand had been made previously to the issuing of the warrant. The jury found a verdict for the defendant for the aggregate sum of the six rates, deducting the amount of the other. The court set aside this verdict, and directed a verdict for the plaintiff, holding that this case was to be distinguished from the case of a distress for rent, and that a precise demand was necessary previous to the issuing of the warrant of distress, contrary to the opinion of *Wood, B.*, before whom the cause was tried.

Hurrell was rated to the poor of *R.* In the first rate, after the statement of the rental, the description was "late *Hurrell's*, now ———:" and in the subsequent rates, "late *Samuel Hurrell*:" Held sufficient by *Wood, B.*, at *Nisi Prius*.

REPLEVIN. The defendant avowed, as overseer of the parish of *Rayleigh*, that the goods were taken in distress, under stat. 43 *Eliz. c. 2.* Plea, *de injuria*. At the trial, before *Wood, B.*, (*Essex Lent* assizes, 1818,) the following facts were proved. On the 9th of *January*, 1817, a distress-warrant was signed by the magistrates, directed to the churchwardens and overseers of the poor of the parish of *Rayleigh*, for distraining the goods of the plaintiff for the sum of 10*l.* 17*s.*, being the aggregate amount of seven several poor-rates. On the

execution of this warrant the plaintiff replevied; and at the *Epiphany* session, 1817 the plaintiff entered and respited his appeal against the said rates, and gave notice for trial at the *Easter* session following, when he was obliged to abandon his appeal against the first six rates, on the ground of not being in time for appealing; and the respondents then consented that the last rates should be quashed, on the ground of non-occupancy by the plaintiff at the time of the allowance of the rate. In the first rate, after the rental, the premises were rated as "late *Hurrell's*, now ———;" and in the subsequent rates, as "late *Samuel Hurrell*;" and, at the trial of the cause, the counsel for the plaintiff objected, *first, that the plaintiff ought to have been named in the rate; but *Wood*, B., on the authority of *Rex v. Painswick*,† overruled [*370 this objection. The second objection was, that the warrant of distress was bad, on account of its being a warrant to levy for the aggregate amount of seven rates, (the last of which was quashed, on appeal after the distress,) whereas there should have been a distinct warrant for each rate. *Rex v. Newcomb*, 4 T. R. 368, and *Forty v. Imber*, 6 East, 434, were cited; but the case most relied on by the plaintiff was that of *Milward v. Caffin*, 2 W. Bl. 1330, *Wood*, B., having expressed his opinion in disfavor of the objection, and having declared that he could not distinguish this case from the case of a distress for rent, (where, if the rent due be less than the sum for which the avowry is made, such avowry is not vicious,) the jury found a verdict for the defendant for the sum of 93*l.* 4*s.*, being the remainder of the amount of the aggregate rates, after deducting the last of them. The learned judge having reserved the last point for the opinion of this court,

Best, Serjt., in the last term, obtained a rule *nisi* to set aside the verdict, and, instead thereof, to enter a verdict for the plaintiff. And now,

Leis, Serjt., showed cause. One warrant of distress for the aggregate amount of several duties imposed by different acts of parliament, each giving a power of distress, is legal, *Patchett v. Bancroft*, 7 T. R. 367. Since the statute 11 G. 2. c. 19., there has been no case where, if it turned out that less rent was due than the defendant had avowed for, he has not been holden to be entitled *to recover for so much as was due;‡ a distress for poor-rates is analogous to a distress for rent; and the defendant having avowed for [*371 the whole seven rates, is entitled to a verdict for six.

Best, Serjt., in support of his rule, was stopped by

The court, who held, that this case was to be distinguished from the case of a distress for rent; and that the party rated was entitled to a precise demand of the sum actually due for the poor-rate, previously to the issuing of the warrant of distress. As no such demand appeared to have been made in this case, they made the rule

Absolute.

† 2 *Nolan*, 110. 3d edition. *Burr. S. C.* 465.

‡ By *Ellenborough*, C. J. *Forty v. Imber*, 6 East, 437.

(IN THE EXCHEQUER CHAMBER.)

SOLLY v. WEISS.

[2 Moore 420. S. C.]

Assumpsit in K. B. that *B.* was indebted to *A.* in a certain sum for certain commission and reward due, and of right payable from *B.* to *A.*, for and in respect of *A.*, at *B.*'s request, having guaranteed the payment of divers goods by *A.* before then sold, as *B.*'s factor to third persons, and that, in consideration thereof, *B.* afterwards promised to pay *A.* the said sum. Verdict for *A.*, and judgment thereon. The court (*Cam. Scacc.*) affirmed the judgment on error.

Weiss sued *Solly* in K. B. in *assumpsit*, and, after having declared against him in the four first counts, for work and labor as his factor or agent, in selling, purchasing, shipping, stowing, and keeping in warehouses divers goods and merchandises, averred in the fifth count that he was indebted to him in a certain sum, for certain commission and reward due, and of *right payable
*372] from *Solly* to *Weiss*, for and in respect of *Weiss*, at the like special instance and request of *Solly*, having guaranteed the payment of divers goods and merchandises by him before then sold, as the factor and agent of *Weiss*, to divers persons; and that, being so indebted, *Solly*, in consideration thereof, afterwards undertook and faithfully promised to pay the same. Counts for interest and the money counts. Plea, general issue. At the trial the jury found a verdict for *Weiss*; and judgment was signed accordingly.

Solly assigned for error, that no certain or sufficient consideration was stated in the fifth count of the declaration for the promise and undertaking of *Solly*, therein supposed to have been made, and that the fifth count was wholly insufficient and informal, in not stating how and in what manner or to whom *Weiss* guaranteed the payment therein mentioned, and that the consideration stated in the fifth count was not sufficient to support the said promise, and that the said fifth count was in other respects too general and uncertain, and informal.

Joinder in error.

Taddy, for the plaintiff in error. The consideration in *indebitatus assumpsit* must always be executed. When the consideration stated is merely an engagement or promise by the plaintiff, it is not an executed consideration; nor will *indebitatus assumpsit* lie on mutual promises; *Hard's* case, 1 Salk. 23. The having guaranteed the payment of goods, is merely the having made an engagement or promise in the nature of guarantee, and no commission or reward is necessarily due for having so guaranteed. If it be said that, by the agree-
*373] ment, in the present case, it was stipulated *that something should be paid for the guarantee, it shows clearly that this agreement should be stated. In *Wise v. Wise*, 2 Lev. 52, an executor declared in *assumpsit* that the defendant, being indebted to the testator 20*l.* *quas illi solvisse debuit secundum agreementum inter eos habi'*, promised to pay, and, after verdict upon *non-assumpsit* judgment was stayed; "for this is no more than a general *indebitatus assumpsit*, because it does not appear what the agreement was, by deed or without deed, by obligation, or how;" and in *Hibbert v. Courthope*, Carth. 276, the reason why the plaintiff is bound to show wherein the defendant is indebted, is given, *viz.* that it may appear to the court that it is not a debt on record or specially. But what the agreement was here, to whom it was made, and whether it was extended to the whole value or to a part only of the goods is quite uncertain. In *Caruthers v. Graham*, 14 East, 578, the count stated that the defendants were indebted "for certain commissions before that time,

and then due and payable;" here it is stated, "for certain commission and reward due and of right payable," without saying when; nor is there any substantial consideration stated to support this count.

Campbell, contra, stopped by the court.

GIBBS, C. J. In the fifth count of this declaration it is stated, that the defendant below was indebted to the plaintiff below in a certain sum, for certain commission and reward, due and of right payable from the defendant below to the plaintiff below, for and in respect of the plaintiff below having guaranteed the payment of divers goods, &c. by him before then sold, as the factor and agent of the defendant below, to divers persons, at his request; and that, in consideration thereof, the defendant *below promised to pay to the plaintiff below the said sum. We think that this count is sufficient in law. A [*374 factor is entitled to his commission, immediately upon effecting the sale, and upon the promise stated in the count, the commission became payable. In *Caruthers v. Graham*, the same point, or one similar in principle, has arisen, and though it is not stated here, in terms, as in that case, to whom the guarantee was given, it is stated here, that the plaintiff below sold the goods as factor to the defendant below; and it is clear, from the context, that the plaintiff below gave the guarantee to the defendant below.

Judgment affirmed.†

† [See note to the American edition of 4 Barn. & Ald. 271, *Mayor, &c. of Reading v Clarke*.]

*ANTHONY HILL, v. THOMPSON and FORMAN. [*375

[2 Moore 424. S. C.]

A patent had been obtained for "the invention of certain improvements in the smelting and working of iron;" and the patentee, in his specification, declared, that his improvements consisted in certain processes thereafter set forth, by which the iron contained in slags or cinders, produced from the several furnaces, was, by smelting, brought into the state of bar iron, (whether all the sorts of the said slags, or any of them, were mixed together and used, or whether all the sorts of the said slags, or any one or more of them, were compounded with iron stones or iron ores, or with both of them; whether all the said several compounds were used together, or whether only one or more of them were used,) and further, in the use and application of lime to iron subsequently to the operation of the blast-furnace, whereby that quality in iron called "cold short" was prevented. The patentee then declared, that in the smelting he used a mixture of lime and mine rubbish, and stated their proportions and also the various processes, compounds, and proportions used in the different furnaces in the smelting and working; and further declared that he had *discovered* that the addition of lime or limestone, or other substances consisting chiefly of lime, and free, or nearly free, from any ingredient known to be hurtful to the quality of iron, would sufficiently prevent or remedy that quality in iron called *cold short*, and would render such iron more tough when cold.

On the trial of an action for the infringement of this patent, it appeared that iron had before been extracted from slags, that it had been previously discovered, and even published, that the application of lime would prevent the quality called *cold short*, that such application had been used for that purpose in an extensive iron work for a series of years, previous to the date of the patent; and that the defendants had not worked according to the processes, compounds, and proportions described in the specification, for that they frequently varied the proportions, and, in one instance, omitted one of the ingredients altogether, with an equally successful result: Held, by three judges, *Gibbs, C. J., abente*, that there had been no infringement, and that the patent was void, the invention claimed not being new.

THIS was an action directed by the Lord Chancellor, 3 *Merrivale*, 622, to try the validity of a patent for "the invention of certain improvements in the

smelting and working of iron," granted to the plaintiff 28th of July, 1814. The declaration charged the defendant with the infringement, in various counts, in a variety of ways. Plea, general issue. At the trial before Dallas, J., (*Westminster* sittings, after *Michaelmas* term last,) the *plaintiff's specification, dated 25th of January, 1813, was proved, which, after reciting the patent in the usual way, proceeded as follows:

"I, the said *Anthony Hill*, do hereby declare that the nature of my said invention, and manner of performing the same, are fully described and ascertained in manner following, that is to say, my said improvements do consist in the manipulations, processes, and means hereinafter described and set forth, and by which the iron contained in the several sorts of slags or cinders, produced in or obtained from the refinery furnace, the puddling furnace, and the balling or reheating furnace, and which are produced in consequence of or by or during the operations of rolling, or by any treatment to which the crude or pig iron of the blast furnace may be or is usually subjected, in order to improve or alter the quality of the same, is by smelting or working made into or brought into the state of bar iron, whether only one of the said several sorts of slags or cinders be used, or whether all the said sorts of the said slags or cinders, or any of the said several sorts of them, be mixed together and used, or whether all the said sorts of the said slags or cinders, or any one or more of the said sorts of them be compounded with iron stones or iron ores, or with both of them, whether all the said several compounds be used together, or whether only one or more of the said several compounds be used, or whether only one of the several sorts of crude or pig iron obtained from the said slags or cinders, or the aforesaid mixtures of them be used, or whether all or any of the said several sorts of crude or pig iron be mixed or used together, or whether they or any one or more of them be mixed with any one or more sort or sorts of any other crude or pig iron and used, or whether only one of the several sorts of crude or pig iron obtained from all or any or either of the said compounds *of the said slags or cinders with iron stones or ores be used, *377] or whether all or any of the said last-mentioned several sorts of crude or pig iron be mixed and used together, or whether they or any one or more of them be mixed with any one or more sort or sorts of any other crude or pig iron and used; or whether all or any or either of the aforesaid sorts of crude or pig iron be compounded and used with refined metal obtained from the said slags or cinders, or from the said mixtures thereof, or from the said compounds of the said slags or cinders with iron stones and ores, or with the refined metal of any other iron, or where only one of the several sorts of refined metal obtained from the said slags or cinders, or from the said mixtures thereof, or from the said last-mentioned compounds be used, or whether all or any of the said last-mentioned refined metals be mixed and used together, or whether they or any one or more of them be mixed with any one or more sort or sorts of refined metal of any other iron and used, or whether only one of the several sorts of puddled iron obtained from the said slags or cinders, or from the said mixtures thereof, or from the said last-mentioned compounds be used, or whether all or any of the said last-mentioned puddled irons be mixed and used together, or whether they or any one or more of them be mixed with any one or more sort or sorts of any other puddled iron and used. And that my said improvements do further consist in the use and application of lime to iron subsequently to the operations of the blast-furnace, whereby that quality in iron from which the iron is called "cold short," howsoever and from whatever substance such iron be obtained, is sufficiently prevented or remedied, and by which such iron is rendered more tough when cold. And I do further declare, that in the said smelting and working, I do use a mixture of lime or limestone, and of the substance in which the *iron stones are generally found, and which is known in *378] *South Wales*, by the name of mine rubbish, whether raw or calcined, consisting, by weight, of about six parts of good limestone to five parts of raw

mine rubbish, which said mixture I do apply together with the other materials operated upon in the blast-furnace for the purpose of producing a fusible cinder, and that the proportions of the said limestone and mine rubbish composing the said mixture may be varied, without materially impairing the beneficial effects thereof. And that in smelting and working, by the usual working of the blast-furnace, all or any or either of the said sorts of the said slags or cinders, or the aforesaid mixtures of them, or all or any or either of the said compounds thereof, with iron stones or ores, when such slags or cinders or compounds last-mentioned are known by assay or otherwise to be capable of affording crude or pig iron to the amount of 50 *per cent.* or thereabouts, by weight, I do, in order to make one charge, take and use eighteen cubic feet by measure, or about four hundred and fifty pounds by weight, of coke, and from three hundred pounds to four hundred and twenty pounds of the said slags or cinders, or the said last-mentioned mixtures and compounds, and from seventy pounds to ninety-five pounds of the said raw mine rubbish, and from one hundred and eighty pounds to two hundred and forty pounds of the said limestone, or from one hundred and ten pounds to one hundred and forty-five pounds of lime, which charge I do repeat, according to the usual manner of filling and working the blast-furnace. But that, when the said slags or cinders, or the last-mentioned mixtures or compounds, which are known by assay or otherwise to contain respectively either more or less than 50 *per cent.*, by weight, of crude or pig iron, are required to be smelted and worked by the usual working of the blast-furnace, it will be necessary, in order to produce the best effect, that the quantity and proportions thereof, and of the limestone and raw mine rubbish to be made use of in the charge as aforesaid, *should be varied; and that, as a general rule of practise to be adopted and followed, I do declare that I do mix [*379 all or any or either of the said sorts of the said slags or cinders with raw mine rubbish if required, or I do mix all or any or either of the said last-mentioned compounds with raw mine rubbish if required, until the crude or pig iron contained in either of such aggregate mixtures shall amount to 40 *per cent.*, or less than 40 *per cent.* if so wished, and then, in order to constitute a charge, I do take from either or both of such aggregate mixtures from three hundred and fifty pounds to five hundred and fifty pounds in the whole, and eighteen cubic feet by measure, or about four hundred and fifty pounds, by weight, of coke; and I do flux the whole by adding six parts, by weight, of limestone for every five of such parts of the raw mine rubbish as may have been used for the purpose last before-mentioned, and I do add so much more lime or limestone, as may be known by assay or otherwise, to be required to produce a fusible cinder. And further, that it will be advisable to reduce the said slags, or the said mixtures of the said slags or cinders, or the said compounds of the said slags or cinders with the said iron stones and ores, and the limestone and raw mine rubbish aforesaid, previous to their being put into the blast-furnace, to about the size at which materials are commonly used in the blast-furnace. And further, I do draw off from the blast-furnace the crude or pig iron afforded by the said slags or cinders, or by the said last-mentioned mixtures or compounds. And I do make the several sorts of crude or pig iron obtained from the said slags or cinders, or from the said last-mentioned mixtures or compounds into bar iron, by puddling, reheating and rolling, compressing or hammering, or by refining, puddling, reheating and rolling, compressing or hammering, whether only one of the said several sorts of crude or pig iron be used, or whether all or any of the said several *sorts of crude or pig iron be mixed and used together, [*380 or whether they or any one or more be mixed with any one or more sort or sorts of any other crude or pig iron, and used; or whether all or any or either of the aforesaid sorts of crude or pig iron be compounded and used with refined metal, obtained from the said slags or cinders, with iron stones or ores, or with the refined metal of any other iron, and used; or whether only one of the several sorts of refined metal obtained from the said slags or cinders,

or from the said mixtures thereof, or from the said last mentioned compounds, be used, or whether all or any of the said last-mentioned refined metals be mixed and used together, or whether they or any one or more of them be mixed with any one or more sort or sorts of refined metal from any other iron, and used; or whether only one of the several sorts of puddled iron, obtained from the said slags or cinders, or from the said mixtures thereof, or from the said last-mentioned compounds, be used; or whether all or any of the said last-mentioned puddled iron be mixed and used together; or whether they or any one or more of them be mixed with any one or more sort or sorts of any other puddled iron, and used. And I do further declare, that *I have discovered that the addition of lime or limestone, or other substances consisting chiefly of lime, and free or nearly free from any ingredient known to be hurtful to the quality of iron, will sufficiently prevent or remedy that quality in iron from which the iron is called cold short*, and will render such iron more tough when cold; and I do, for this purpose, if the iron, howsoever and from whatever substance the same may have been obtained, be expected to prove cold short, add a portion of lime or limestone, or of the other said substances, of which the quantity must be regulated by the quality of the iron to be operated upon, and by the quality of the iron wished to be produced; and further,

*381] that the said lime or limestone, or other aforesaid substances, may be added to the iron at any time subsequently to the reduction thereof, in the blast-furnace, and prior to the iron becoming clotted, or coming into nature, whether the same be added to the iron while it is in the refining or in the puddling-furnace, or in both of them, or previous to the said iron being put into either of the said furnaces. And further, that I do, in preference, add quick lime instead of limestone, or the said other substances (either of which, as to quantity, whensoever and howsoever so used, may be considerably varied,) to the iron in the refinery-furnace and in the puddling-furnace. And I do further declare, that I do greatly prefer to mix or add, in the refinery-furnace, about from one-fourth to one-third, by weight, of the crude or pig iron which has been obtained from the slags or cinders, with three-fourths or two-thirds of the crude or pig iron, which has been obtained from the iron stones. And I do further declare, that, for the operation in the refinery-furnace, I do add the lime as it is obtained from the kiln, in the proportion of one-sixtieth to one-fortieth part, by weight, of the whole weight of the crude or pig iron intended to be worked in the furnace; and I do apply about one-half of the said lime, together with the crude or pig iron, as it is thrown upon the refinery-fire, and the remainder, from time to time during the course of the refinery operation, taking care not to suffer the slag or cinder which is produced to get too thick, nor to endanger the stopping up of the furnace: and I do also declare, that in the puddling-furnace I further add lime in the proportion of from one-hundredth part to one-eightieth part, by weight, of the whole weight of the iron in the furnace, which lime I previously slake and wet to prevent its being carried off by the draft of the furnace; and I do apply the same, in the course of that part of the operation, *382] which is known to workmen by the term of drying the iron; and, moreover, I take care that the same shall be intimately mixed and minutely dispersed through the iron by the usual operations of puddling.”†

† For the ordinary mode of manufacturing iron of late years, see *Aikin's Dictionary of Chemistry and Mineralogy*, vol. i. p. 594. column 2. and the following pages. See also *Kidd's Outlines on Mineralogy*, vol. 2. p. 178.

Note. In that department of the manufacture of iron called *puddling*, cast iron bottoms or floors have been generally employed, but as these bottoms decay rapidly, and as it has been found that the iron slag, scoria, or sand, which are employed to defend these bottoms from injury, impart impurities to the iron, Mr. Harford has adopted the following mode of rendering them durable, for which he has taken out a patent. He spreads over the cast iron bottoms a quantity of charcoal, reduced to powder, which being a bad conductor of heat, protects the cast iron floors better than any other substance from the intense heat which is required in those furnaces. This very simple contrivance is said to produce iron of a very superior quality. See the *Edinburgh Philosophical Journal*, (No. 14.) for October, 1822. vol. vii. p. 369.

For the plaintiff it was sworn, by his clerk, that bar iron, uniformly approved of, had been manufactured from slags, according to the specification, in considerable quantities; that, previously to the patent, heaps of slags had been either lying, as useless, or had been thrown away as refuse, at iron manufactories, attempts having been made to convert them to advantage, and having uniformly failed; that mine rubbish (the *matrix* of the iron stones) had never before been mingled with slags for the purpose of producing bar iron; that, in order to prevent the state of bar iron called *cold short*,† the lime, &c. had been used in the proportions specified, though those proportions had been [*383 sometimes a little varied; but that the proportions specified were essential to the most successful result; and that the exact proportion of cinders or slags and iron stone specified had not invariably been attended to in working under the patent.

Three other witnesses, who had been acquainted with the manufacturing of iron from twenty to thirty years, corroborated the clerk as to the uselessness and rejection of slags before the patent, and proved their ignorance that lime was ever before used in the processes of puddling and refining for the prevention of the state of *cold short*, and the novelty to them of the specified modes for converting the slags into bar iron, and preventing the state of *cold short*: and *David Mushet*, who had superintended iron manufactories for twenty-five years, and had studied and written on the subject,‡ corroborated the witnesses as to the former uselessness of slags, and gave his opinion, that if lime were applied as directed in the specification it would be an effectual prevention of the state of *cold short*, and that the application, as specified, was entirely new, and the specification perfectly intelligible; observing, that the plaintiff's invention consisted not in the discovery of new ingredients or new principles, but in a combination of ingredients and principles never existing so combined before.

To prove the infringement, *Edward Forman*, the son of one of the defendants, and the superintendent of *their works, was called, and stated, that he had seen the plaintiff's specification; that, since the date of the patent, [*384 the defendants preserved cinders, which they had not done before, and produced pig iron, by mixing them with mine rubbish; and that in the subsequent processes they applied quick lime to prevent the iron from being *cold short*. But he stated, that the defendants did not work by the plaintiff's specification, but used very different proportions, viz., lime in the refinery-furnace in about the proportion of a one-hundred-and-twentieth part to the whole charge of pig iron, and that they used none in the puddling-furnace, and that the defendants had used slags in the puddling-furnace for years before the date of the patent. He also proved that the proportions of mine rubbish, as laid down in the specification, were not essential to the success of the process; that the defendants had been in the habit of varying those proportions, and that they once entirely omitted mine rubbish, when the result was most successful.

For the defendants it was proved, that at *Bradley* iron works, in *Staffordshire*, more than forty years ago, (iron stone at that time running short,) slags and mine rubbish were collected and purchased and used in the blast-furnace, and that coke, mine rubbish, *Lancashire* or *Cumberland* ore, limestone, and puckstone, were used to convert the slags into pig iron, which, after certain processes, were converted into good bar iron. It was also proved that, at

† "Iron that is *hot short* or *red short* is very soft and ductile when cold, on which account it is generally employed in the manufacture of wire; it may also be hammered and welded if treated skilfully at a full white heat; but when it has cooled down to a cherry red, it breaks away before the hammer, and is dissipated almost like sand.

Cold short iron, on the contrary, is harder, not only than *hot short*, but also than pure *Swedish* bar iron; it may be wrought in the usual way when red or white hot, but possesses no toughness when cold; so that a large bar may with ease be broken across by a common hand-hammer." *Aikin's Dictionary*, vol. i. p. 609. column 2. See also *Kidd's Outlines of Mineralogy*, vol. 2. pp. 167. 183.

‡ See his papers on iron in *Tilloch's Philosophical Magazine*, vols. ii. iii. xii.

Benthall iron works, in *Staffordshire*, as far back as the year 1788, the slags from the refinery-furnace, together with coke, iron-stone, limestone, and poor-robin,† were used in the blast-furnace for the production *of pig iron, which was afterwards converted into good bar iron; and that at *Bingley*, in *Staffordshire*, many years ago, slags had been used in the same way, and with the same results.

A witness, named *Northall*, proved that slags had been used at *Millfield* works, in *Staffordshire*, together with coke, iron-stone, and lime, in the blast-furnace, in 1803, and that he then knew how to correct the state of "*cold short*" in iron produced from the slags, by the application of lime in the puddling-furnace, and that these works were, in consequence, without a forge, which would otherwise have been necessary to prevent the iron from being *cold short*. *Thomas Robinson*, a manager of *Kelley* works, *Staffordshire*, from 1803 to 1816, produced a journal of experiments, commenced by him at these works in 1807, with a view to the prevention of *cold short*. At that time limestone was there used in the refinery-furnace, not with the view of curing the "*cold short*," but the use of it was found to make the iron more tough. He used limestone in the refinery-furnace to black hard pig iron (which generally affords a slag in the refinery-furnace inferior to that afforded by other pig iron, and generally produces cold short iron,) and the limestone made the slag from these pigs as good as the slag produced from good pig iron without the aid of limestone.

From 1807 to 1809, he used quick-lime, and afterwards, up to 1816, lime wash upon coke, in the proportion of about 20 lbs. of lime to 10 cwt. of pig iron. This made the iron, which would otherwise have been *cold short*, tough. He tried lime in the puddling-furnace, in order to obtain the same advantage, and he obtained the advantage, though the apparatus was spoiled: but he would have continued to use limestone in the puddling-furnace had he not preferred its *386] use in the refinery-furnace. He did not treat iron obtained *from slags with lime according to that process, but used another.

For the defendants it was urged, that there was no novelty in the alleged invention, and that the mere regulation of principles before known and practised was insufficient to support the patent, which was too general; that the specification was equivocal and ambiguous, and that the plaintiff had taken out his patent for too much, and had not even confined himself to the particular proportions of the various ingredients, the proportioned combination of which alone constituted his alleged discovery. *Dallas, J.*, left it to the jury to say, whether the plaintiff had made out the novelty of the invention or improvement for which the patent was taken out; namely, the conversion of slags into good bar iron, and the prevention of the quality called *cold short*, by the application of lime. The jury found a verdict for the plaintiff, with one shilling damages.

Lens, Serjt., in *Hilary* term last, obtained a rule *nisi* to set this verdict aside, and to enter a nonsuit, or have a new trial; first, on the grounds urged at the trial; secondly, because the verdict was against evidence, inasmuch as it had been proved that lime had been applied to the prevention of the quality called *cold short*, and that good bar iron had been produced from slags and mine rubbish long before the patent. And he cited a passage from *Aikin's* Chemical and Mineralogical Dictionary, to show that the application of lime for the cure of the quality called *cold short* was notorious‡ at a much earlier date.

† A very inferior kind of iron stone, found in the vaults beneath the iron-stone measures. It contains very little more iron than is contained in mine rubbish.

‡ "*Rinman* says, that cast iron, which by the common treatment would yield cold short bar, may be made to afford soft malleable iron, by fusing it with a mixture of equal parts of lime and scoriz." Vol. i. 610. col. 1.

Note. This book, which was referred to by *Dallas, J.*, in summing up, had not been given in evidence; but, as it lay open on the table at the trial, and had been then referred to by both parties, *Park, J.*, suggested that it could not be now objected, that it had not been correctly mentioned by the judge in his summing up; and in this suggestion the counsel on both sides acquiesced.

*In the last term, *Best* and *Copley*, Serjts., showed cause against the rule which was then supported by *Lens*, *Vaughan*, and *Pell*, Serjts.

Substance of the argument in showing cause. Although the principles on which the patent was founded might have been previously known, and although the various articles specified might have been previously used, yet the combination of those principles and the use of those articles in certain proportions in a new series of processes, leading to and terminating in a beneficial result, will support the novelty of invention claimed by the patent: the novelty of such combination and proportions, and the successful result of them, has not been controverted. The patent has not been taken out for too much, nor does the specification embrace more than the patentee is entitled to by his patent. Neither, is the specification equivocal and ambiguous. It is not necessary that every information on such a subject as that with which this patent is conversant should be given by the specification. In such cases, general knowledge must be resorted to, and the party must carry a reasonable knowledge of the subject-matter with him to the perusal of the specification.† Neither is it necessary that the processes or articles in such a case as this should be individually new. It is no objection to mechanical or chemical discoveries that the articles of which they are composed were known, and were in use before, provided the compound article which is the *object of the invention be new;‡ for it is settled law, that the new combination of old materials may be the sub- [*388] ject of a patent.§ The passage cited from *Aikin* only shows a previous knowledge of a mode of preventing the quality called *cold short*, by fusing cast iron with equal parts of lime and *scoriæ*: the plaintiff claims the improvement of preventing it by the application of lime only. *Robinson's* evidence does not affect the plaintiff's case. He made a mere series of private experiments; and if he made any discovery, he never made such discovery public. The answer of *Buller*, J., upon the objection raised to *Dollond's* patent for the invention of achromatic telescopes, (which objection was, that *Dollond* was not the inventor of the new method of making the object glasses, but that Dr. *Hall* had made the same discovery before him,) applies to *Robinson's* experiments in this case. *Buller*, J., in the case of *Boulton v. Bull*, 2 H. Bl. 470, observed upon that objection, that as Dr. *Hall* had confined the discovery to his closet, and the public were not acquainted with it, *Dollond* was holden to be the inventor. To make *Robinson's* experiments (even if they had been applied to the manufactory of iron from slags, which was not the case) destructive of the plaintiff's patent, they should have been communicated to workmen, and brought into efficient use in the manufactory. Such a previous use of an alleged discovery would, as it did in *Tennant's* case,|| have gone far to destroy the patentee's rights. But here there had been no such use, and the verdict of the jury [*389] ratified *the patentee's right to the invention which he had claimed.

Substance of arguments in support of the rule.

The patent is too large, has introduced nothing new, and if it had, it has not been infringed. It is too large: for it is taken out generally "for certain improvements in the smelting and working of iron," and cannot be understood to apply particularly to the smelting and working of iron obtained from slags or cinders to which it is narrowed in the specification. The patent ought to have been confined to improvements in the smelting and working of iron obtained from slags or cinders, and to the application of lime for the prevention of the quality called *cold short* in iron so obtained. In 1800 and 1801 *Matthias Koops* took out two patents; the first for a method of manufacturing

† *Harmar v. Playne*, 11 East, 101, and the dicta of *Le Blanc*, J., and *Ellenborough*, C. J., pp. 111, and 113, of that case.

‡ Per *Buller*, J., in *Boulton v. Bull*, 2 H. Bl. 487.

§ See the dicta of *Ellenborough*, C. J., in *Huddard v. Grimshaw*, *Davies' Patent Cases*, pp. 267 and 278, 279; and the dictum of *Gibbs*, C. J., in *Bovill v. Moore*, p. 412 of the same book.

|| *Davies' Patent Cases*, 429.

paper from straw, hay, thisbles, waste and refuse of hemp and flax, &c., fit for printing upon; the second, for a method of manufacturing paper generally from like substances, enumerating them. This was a distinct notice of his invention, and accordingly *William Pless*, in his patent for a method of manufacturing paper for various purposes, taken out in 1802, was enabled to steer clear of *Koops'* invention.† The case of *Lord Cochran v. Smethurst*,‡ is conclusive against the plaintiff upon this part of the case. As to the alleged novelty of the method of extracting iron from slags, and preventing the quality called *cold short* by the application of lime stated in the specification, the evidence is all against the plaintiff. He has produced no definite improvements or new beneficial result, for when his combinations *were discarded, the result was equally beneficial. The passage in *Aikin* is completely destructive of the plaintiff's case as to his claim for the invention of applying lime as a prevention of the quality called *cold short*: the word "*scoriae*" adverted to by the plaintiff's counsel, is only a synonym for slags or cinders. After reading that passage, it can never be said that the plaintiff, in the words of the specification, has discovered that the addition of lime or limestone would sufficiently prevent or remedy that quality in iron from which it is called *cold short*. In *Bovill v Moore*, the greater part of the processes which formed the combination on which the patent was founded, had been used before: the subsequent stages were new: but there, as in this case, the plaintiff had in his specification described an invention to a greater extent than the proof warranted, and the patent could not be sustained.

Cur. adv. vult.

And on this day (*Gibbs*, C. J., having been absent during the argument,) *Dallas*, J., delivered the judgment of the court.

In this case it will not be necessary to state the patent with the specification at large, or the pleadings in the cause. These have been fully adverted to at the bar in the course of the argument on each side; and it will now be sufficient to refer to them generally as I proceed. The declaration in substance charges an infringement of the patent; and the jury have found for the plaintiff. The finding involves, first, that the patent is valid, subject to every legal consideration in this respect; and, secondly, that the defendants have worked according to the specification, and have thereby infringed the plaintiff's right. The last point, if properly found, leads to the first consideration, viz. the validity of the patent; but, if it ought not to have been so found, then the validity *becomes immaterial: *for whether the patent be valid or not, signifies
 *391] nothing in this particular case, if the defendant has not worked according to the specification. To prove the infringement of the patent one witness only was called; and this part of the case depends, therefore, entirely upon his testimony. And, before adverting to the evidence in question, it will be necessary to look to the patent as far as it relates to this part of the subject. It has not been contended, that it is a patent introducing into use any one of the articles mentioned singly and separately taken; nor could it be so contended, for the patent itself shows the contrary: and, if it had been a patent of such a description, it would have been impossible to support it; for slags had undoubtedly been made use of previously to the patent, so had mine rubbish, and so had lime. But, it is said, it is a patent for combinations and proportions producing an effect altogether new, by a mode and process, or series of processes, unknown before; or to adopt the language made use of at the bar, it is a patent for a combination of processes altogether new, leading to one end: and, this being the nature of the alleged discovery, any use made of any of the ingredients singly, or any use made of such ingredients in partial combination, some

† See *Collier's Law of Patents, Appendix*, p. 72, tit. *Paper*.

‡ 1 *Starkie, N. F. C.* 205, *S. C. Davies' Patent Cases*, 354.

of them being omitted, or any use of all or some of such ingredients in proportions essentially different from those specified, and yet producing a result equally beneficial (if not more so) with the result obtained by the proportions specified, will not constitute an infringement of the patent.

It is scarcely necessary here to observe, that a slight departure from the specification for the purpose of evasion only would, of course, be a fraud upon the patent; and, therefore, the question will be, whether the mode of working by the defendant has or has not been essentially or substantially different. For this we must look to the evidence of *Edward Forman*, and, he being [*392 the single witness to the point, by his testimony this part of the case must stand or fall. It may be difficult entirely to reconcile different parts of his evidence with each other, if his answers to the several questions be taken separately and detached: but, on looking to the result, it seems to be clear. On the part of the plaintiff, he proves, that before the patent was taken out, the defendant was not in the habit of making use of slags: and that, his attention being called to the subject by the patentee in the first instance, and then by the patent itself, he has made use of them uniformly since; he has since also, at times, used mine rubbish, and also lime, which last, he admits, was used to prevent the *cold short*; which defect, he also allows, was and is thereby prevented. So far, therefore, he proves separate use and occasional combination. He is next asked as to the proportions mentioned in the patent. Did you apply the lime in these proportions? His answer is—I say no to that.—Have you worked by the specification? No, we did not.—He then explains in what respects they departed from the specification. This is his evidence on the examination in chief. On the cross examination he says, that the proportions used were very materially different, and that the proportions in the patent are not essential; that it would make no difference to him if he were to be restrained from using these proportions; and that the result would be better obtained by materially departing from them, indeed by almost losing sight of them altogether. With respect to slags, on reconsideration, he states, that the defendant had used slags previously to the patent in the puddling furnace, for months together. As to mine rubbish, he says, we varied the proportion, and we found in experience, that the use of it was best without reference to the preparations and restrictions pointed out in the specification, and, when omitted, the result was best of all. It is true, he afterwards states, that this omission took place when he was absent from home, and that, on his return, he ordered the mine rubbish to be restored; and in this respect, and going to this single point, there appears to be an inconsistency. But still, as the case stands on his single evidence, if, in substance and result it proves a mode of working essentially different from the specification, the foundation of the plaintiff's case is altogether gone. And the rule is, in this respect, strict, as stated by Mr. Justice Buller, in the case of *Turner v. Winter*. In that case, the learned Judge expressed himself in these words, "Whenever the patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must show in what his invention consists, and that he procured the effect proposed in the manner specified, *Davies' Patent Cases*, 153, s," and in another part of the same case he adds, "Slight defects in the specification will be sufficient to vacate the patent, *Ibid.* 155. s;" and, speaking of degree and proportion, he says, "The specification should have shown by what degree of heat the effect was to be produced, *Ibid.* 154. s:" in that case, as in a great variety of others, instances may be found to show the strictness of the law, as bearing upon this point, either in regard of omission or of superfluous addition, or of uncertainty or insufficiency in quantities proposed. But, further, the evidence so applied does not confine itself to this point only; for it disproves also utility, as far as it depends on combination and proportion leading and conducing to a specific result. Neither can it be justly said, that the use of the separate ingredients, or some of them partially combined, is a use made of the invention *in [*394

part, so as to support the counts adapted to such partial use; because, as it has been already observed, and will more particularly be adverted to hereafter, each of the ingredients had before been separately used, and had been used more or less in partial combination.

On the whole, our opinion is, as to this part of the case, that, considering the evidence of *Forman*, in its substance and result, and with reference to the peculiar nature of the patent, an infringement of the patent is not thereby proved.

And here I might stop, but, from consideration for the parties, it may be proper to dispose of the next ground on which the rule was obtained, namely, that the invention claimed, is not new; and this, like every other patent, must, undoubtedly, stand on the ground of improvement or discovery. If of improvement, it must stand on the ground of improvement invented; if of discovery, it must stand on the ground of the discovery of something altogether new: and the patent must distinguish and adapt itself accordingly. If the patent be taken out for discovery, when the alleged discovery is merely an addition or improvement, it is scarcely necessary to observe, that it will be altogether void. Of which description this patent is, will be hereafter examined; at present, it will be sufficient to say, that the grounds of novelty and discovery are three, on which it must stand. If the discovery claimed were known and made use of before, the patent is at an end.

Now, with reference to this particular case, it may be proper shortly to consider what novelty and discovery are deemed to be; and, when I say, "novelty and discovery," I mean to distinguish between those terms; for it is not enough to have discovered what was unknown to others before, if the discovery be confined to the knowledge of the party having made it; but it must have *395] been communicated more or less, or it must have been more or less made use of, so as to constitute discovery, as applied to subjects of this sort. The case of *Dollond*, has been mentioned at the bar, as also *Tennant's* patent for bleaching liquor, and they stand so contrasted as to illustrate the distinction to which I allude. In *Dollond's* case, the question was, who was the true inventor within the meaning of the statute. *Hull*, had made the discovery in his closet, but had never made it public; and, on this ground, *Dollond's* patent was confirmed. In *Tennant's* case, the great utility of the invention was proved, and the general ignorance of the bleachers of it till after the date of the patent. But, on the other side, a bleacher near *Nottingham*, deposed, that he had used the same means of preparing his bleaching liquor, for six years anterior to the date of the patent, but that he had kept his method a secret from all but his two partners, and his two servants concerned in preparing it. In addition to this, different conversations were proved to have passed between *Tennant*, and a chemist of *Glasgow*, before the patent, and, in these conversations, the chemist had suggested to *Tennant*, the basis of the improvement in question. Under these circumstances *Tennant* was deemed not to be the inventor, and a nonsuit took place. So, in the case of *Arkwright's* patent:† with respect to a particular roller, part of the machinery, the evidence was, that *Arkwright* had been told of it by one *Kay*; that, being satisfied of its value, he took *Kay* for a servant, kept him for two years, employed him to make models, and afterwards claiming it as an invention, made it the foundation of a patent. The same fact was proved as to a crank, which had been discovered by a person of the name of *Hargrave*, which also had been adopted by *Arkwright*; and although it had *396] been made use of in a degree before by a few, a general ignorance with respect to it was proved by a great number of persons in the trade. Mr. Justice *Buller*, was of opinion, that, though this might be perfectly true, (that is, the general ignorance as to those improvements,) it signified nothing; the fact that the witnesses on the part of the defendant had not heard of those im-

† See *Res v. Arkwright, Davies Patent Cases*, 61.

provements, was no contradiction of previous knowledge and previous use by others. The close application of these decisions to the present case will appear as I proceed further; at present I will only say, looking at the subject in question in this light, is the plaintiff to be considered as the inventor, be it improvement claimed or be it altogether discovery? And this leads to the evidence in this respect.

On the part of the plaintiff several witnesses were examined, on whose testimony it will be sufficient generally to observe, they proved that, of whatever description that for which the patent was taken out may be deemed, it was altogether new to them. One witness in particular is entitled to have the greatest weight given to his testimony, I mean Mr. *Musket*; he has himself published treatises on the subject of iron; he has studied the subject as matter of chemistry and science; his works have been received every where as a standard authority; and, further, he is a person of the greatest and most extensive practical experience.† His account of the patent in question is, that it is a combination of processes known before separately, but in combination new, and producing a beneficial result. So far the case appears, upon the part of the plaintiff, to be strongly proved. But, first, it is to be observed, that the evidence, be its strength what it may, is negative merely. The ignorance of the particular witnesses to which I *allude may be perfectly true, consistently with a perfect knowledge by others of the existence of those materials, separately [*397 or in combination, and in a degree more or less extensive; and here *Tennant's* case and *Arkwright's* case, already mentioned, apply, being in this respect and to this point precisely similar.

But let us next look to the articles, which, in substance and in the mode in which they are directed to be made use of, constitute the discovery claimed. Taken as separate ingredients, in this stage of discussion, I shall not dwell upon them: I will only generally say, that of slags or cinders, of mine rubbish, and of lime, as used in various ways, and generally considered as connected with the working of iron, not only knowledge but extensive use has been proved, and this by a great number of witnesses, the evidence being all on one side; inasmuch as there is positive testimony against negative testimony, leaving a result of perfect consistency.

I come next to combination and proportion, considered with a view to utility. If *Forman's* evidence is to be our guide, (and by his testimony the plaintiff must succeed or fail, as to the defendants' working by the specification,) he not only proves a departure from proportions, but a variation in combination, or proportion. If the specific combination may be materially departed from, where is the line to be drawn, and what is there beyond general combination in this patent which professes to be precise and specific in apportionment and application? And it will be recollected, that with a little change of ground, as urgency required, the case has been so represented and so argued at the bar.

Thus much of slags and mine rubbish. I have already spoken in part of lime; but of this, which, though not the sole, seems to be the most material object, it will be necessary now to speak more fully.

*First, then, consider the end to be attained, and next the proposed means of attaining it. The purpose is to render bar iron more tough, [*398 by preventing that brittleness which is called *cold short*, and which renders bar iron less valuable: the means of prevention stated are the application of lime. In what way then is lime mentioned in the patent? The first part of the specification in terms alleges certain improvements in the smelting and working of iron, during the operations of the blast-furnace; and then, introducing the mention of lime, it states that the application of it to iron, subsequently to the operation of the blast-furnace, will prevent the quality called *cold short*.

So far, therefore, the application of lime is, in terms, claimed as an improve-

† In 1800 he took out a patent for his newly-invented processes applicable to metallurgy.

ment, and nothing is said of any previous use, of which the use proposed is averred to be an improvement; it is, therefore, in substance, a claim of entire and original discovery. The recital should have stated, supposing a previous use to be proved in the case, that "whereas lime has been in part, but improperly, made use of," &c., and then a different mode of application and use should have been suggested as the improvement claimed. But the whole of the patent must be taken together, and this objection will appear to be stronger as we proceed. And here again, looking through the patent, in a subsequent part of the specification, the word "discovery" first occurs, and I will state the terms made use of in this respect—"And I do further declare, that I have discovered that the addition of lime will prevent that quality in iron from which the iron is called *cold short*, and will render such iron more tough when cold, and that for this purpose I do add a portion of lime or limestone, to be regulated by the quantity of iron to be operated upon, and by the quality of the iron to be produced, to be added at any time subsequently to the reduction in the *399] blast-furnace, and this from whatever substance the iron may be produced, if expected to prove cold short." Now this appears to be nothing short of a claim of discovery in the most extensive sense, of the effect of lime applied to iron to prevent brittleness, not qualified and restrained by what follows as to the preferable mode of applying it under various circumstances; and, therefore, rendering the patent void, if lime had been made use of for this purpose before, subject to the qualification only of applying it subsequently to the operations in the blast-furnace.

How then is the evidence in this respect? And, first, if the dictionary, so often referred to, in substance informed the public of what the specification or the patent professes to inform them, that will undoubtedly be the first discovery; as, in *Arkwright's* case it was agreed that a book produced, printed and published previous to the patent, constituted the discovery so as to negative invention by the patentee.† It will be sufficient to read one passage from this dictionary; "*Rinman* says that cast iron, which by the common treatment would yield cold short bar, may be made to afford soft malleable iron by fusing it with a mixture of equal parts of lime and *scoriae*." I need not say that *scoriae* are produced by the operation of the blast-furnace; and lime is proposed in combination with those.

Here then is *cold short* stated to be prevented by the application of lime, subsequently to the operation of the blast-furnace; and, in this view of the subject, nothing turns upon precise proportion, the claim being a claim of discovery generally. This book was published in *England* in 1807, and the patent was taken out in 1816. In effect, therefore, this book completely negatives the *400] novelty of the alleged discovery. But *look to the other evidence of actual previous use in various instances in this country. I will shortly state part of it only, the whole being consistent in this respect. One of the witnesses, *Northall*, is asked, (the question going back many years before the patent,) "Did you know how to prevent the quality of cold short in the iron produced from the cinder?" His answer is—"By the application of lime in the puddling furnace."—Now the puddling furnace is one of the stages in which, by the express words of the specification, the lime for this purpose is to be applied; but this, he adds, he heard from one person only, and, therefore, this, if it stood singly, might be considered as slight proof. I will not stop to inquire whether this evidence alone would or would not be sufficient, according to the cases which have been decided; but let me next see what further knowledge, and, beyond this, what use is proved, not only in one but in many instances, and by the different witnesses called, only observing, before I quit the evidence of this witness, that this question appears to have been put to him by one of the jury: "You say that you knew that using lime would prevent

† *Rez v. Arkwright, Davies' Patent Cases*, 129.

the cold short, can you tell us how it ought to be used?" The answer is, "In the puddling furnace." There is much other evidence to the same effect, but I shall content myself with referring to that of Mr. *Robinson*. He produced a journal of entries, in which successful experiments were noted, at the time they were made, of the application of lime both in the puddling and refinery furnaces, for the express purpose of preventing the *cold short*, followed up by a continued use from 1808 to 1816, (a period of eight years anterior to the patent,) when the works which he superintended stopped. The application, therefore, of lime in some way for the purpose proposed, instead of being a secret unknown before, was as public as it could be rendered by a work *of extensive circulation; and, in every view of the subject, therefore, this claim [*401 had been more or less in actual use in this country: so that the present patent would in effect operate as an abrogation of vested and existing rights. I am now upon the subject of the general application of lime claimed as a discovery, without reference to specific apportionment, except as before mentioned.

On this part of the case I will only further remark, that, if any part of the alleged discovery, being a material part, fail, (the discovery in its entirety forming one entire consideration,) the patent is altogether void; and to this point, which is so clear, it is unnecessary to cite cases. In every view of the subject, therefore, the claim to invention and novelty fails, not only virtually and technically, as the patent and specification are framed, but in effect and substance, and in the broadest and most enlarged view of the subject. At the time of the trial, the utility of the alleged discovery being admitted, the fairness of the specification being established, and the publicity afforded by the patent, compared with the partial and previous limited use, giving to the public, as it appeared to me, all but the benefit of actual and original discovery, constituted a case so far favorable to the plaintiff; but, looking to the strictness with which, on the point of discovery, patents must be construed, looking to the decisions in cases of the nearest analogy, and to the peculiar nature of this case under all its circumstances, we feel ourselves bound to decide against the originality of that which is claimed by the patentee as new. On both grounds, therefore, first, that no infringement of the patent has been proved; and, secondly, that the invention is not new, we are of opinion that the plaintiff is not entitled to recover.

**Best*, Serjt., then objected, that the court could not, in this case, [*402 direct a nonsuit to be entered, but should grant a new trial only; but

DALLAS, J., stated, that if he had not wished to give the parties an opportunity of going into the whole of the case, he should have nonsuited the plaintiff on the evidence of *Edward Forman*.

Per curiam.

Rule absolute for a nonsuit.

Best, on a subsequent day, moved on the authority of *Minchin v. Clement*, 1 B. & A. 252, that this nonsuit should be set aside and a new trial had. He urged that he should have had a bill of exceptions, of which he was now deprived, and that his client was in possession of a verdict which, by the course adopted by the court, was taken from him.

DALLAS, J., repeated his observations above made.

BURROUGH, J., said, that the course adopted by the court as to the judgment given, was the result of great consideration both in public and in private. And, The court rejected the application.

[See 4 Barn. & Ald. 541, *Brunton v. Hawkes et al.* 2 Barn. & Ald. 345, *The King v. Wheeler*. 1 Mason's Rep. 182, *Lowell v. Lewis*. *ibid.* 447, *Barrett v. Hall*. 2 Mason's Rep. 112. *Moody v. Fiske et al.* 7 Wheaton's Rep. 356, *Evans v. Eaton*. 3 *ibid.* 454, Same parties.]

*Ex parte HEATHFIELD in the matter of TREVILLE CROSS.

The stat. 16 G. 2. c. 17, for the relief of insolvent debtors, (after enacting that the estate of the insolvent should vest in the clerk of the peace, who should, under certain restrictions, appoint an assignee or assignees for the benefit of creditors) directed such assignee or assignees to render such overplus, if any should be, (their own debts and charges first deducted.) to the prisoner, his executors or administrators; and also provided, that it should be lawful for the Judges of the Courts of K. B., C. P., and Exchequer, or any two of them, from time to time, upon the petition of any creditor of such prisoner, complaining of any fraud, mismanagement, or other misbehavior of all or any of the assignees, upon hearing the parties concerned, to give such directions therein, either for the removal of such assignee or assignees, and the appointing any new assignee or assignees in their place, or for the prudent, just, or equitable management, or distribution of the estate and effects for the benefit of the respective creditors, as the said courts or judges respectively should think fit; and, in the case of such removal, and appointment of a new assignee or assignees, the act directed that the insolvent's estate should be divested out of such removed assignee or assignees, and should be vested in and delivered over to the new assignee or assignees in the same manner, and for the same ends and purposes as the same were before vested in the original assignee or assignees. Under this act an assignee was appointed to dispose of the estate and effects of an insolvent, who took the benefit of the act in the year wherein it was passed. This assignee was removed, and another appointed, under a rule of court of C. P.; and a succession of removals and new appointments took place under C. P. rules, until, in 1779, A. was made assignee of the insolvent's estates under a rule of court of C. P., obtained possession of the insolvent's estate, disposed of some parts of it, and died without distributing the same, or giving any account thereof, leaving B., his heir and representative, him surviving. The personal representative of the insolvent, (who had been dead for some years,) applied to this court for a rule, calling on B. to show cause why a new assignee should not be appointed; and why an account should not be taken before the prothonotary of all sums of money received by A. in his lifetime, or by B. since A.'s decease, belonging to the insolvent's estate. The court rejected the application on account of the unreasonable length of time which had been suffered to elapse before it was made.

THE 16th G. 2. c. 17, passed for the relief of insolvent debtors, after directing sheriffs and jailers to deliver in lists of those who were their prisoners on the 1st of *January*, 1742, to the justices at sessions, and that the said prisoners *404] should be discharged, upon their delivering *a schedule of their estate and effects, to remain with the clerk of the peace, provided that all the estate, right, title, interest, and trust of such prisoner, of, in, and to his real and personal estate, should, immediately after the discharge of such prisoner, vest in the clerk of the peace, who was authorised, by order of the justices, at their general or quarter sessions, to assign the same to such of the creditors of the prisoner as the major part of his or her creditors, who should apply for the same by any writing under their hands, should direct and appoint, in trust for themselves and the rest of the creditors; which assignee (to whom powers of suing, &c., were given) was directed to receive and divide the prisoner's estate and effects, or the moneys arising from the sale or disposition thereof (such sales to be approved by the major part of the creditors) amongst the creditors proving their debts, after one month's notice of dividend, in equal proportions, according to their respective debts; "and after the same is recovered and received, to render the overplus, if any shall be (their own debts and charges first deducted) to the prisoner, his executors or administrators." Persons seized of an estate tail, claiming the benefit of the act, were thereby directed to deliver such estate to their creditors; and it was enacted, that they should be deemed to be seized in fee. Then came the following clause. "And to the intent and purpose that the estate and effects of such prisoner or prisoners as shall be discharged by virtue of this act, may be truly and faithfully applied for the benefit of his, her, or their real creditors; be it enacted, by the authority aforesaid, that it shall and may be lawful to and for the respective courts at *Westminster*, from whence any process issued, upon which such prisoner or prisoners was or were committed, whose effects are so assigned, or where the process issued out of any other court, to and for the Judges of the Courts of King's Bench, Common

Pleas, and Exchequer, or any two of them, from *time to time, upon the petition of any creditor or creditors of such prisoner or prisoners, complaining of any insufficiency, fraud, mismanagement, or other misbehavior, of all or any of the assignees to whom the estate or effects of such prisoner or prisoners shall be assigned by such clerk of the peace as aforesaid, upon hearing the parties concerned, to make and give such orders and directions therein, either for the removal or displacing such assignee or assignees, and the appointing any new assignee or assignees, in the place or stead of such assignee or assignees, so to be removed or displaced, or for the prudent, just, or equitable management or distribution of the said estate and effects, for the benefit of the respective creditors, as the said courts or judges respectively shall think fit; and in case of the removal or displacing of any assignee or assignees, and the appointing of any such new assignee or assignees, the estate or effects of such prisoner or prisoners shall from thenceforth be divested out of the assignee or assignees so removed or displaced, and be vested in and delivered over to such new assignee or assignees, in the same manner, and for the same ends, intents, and purposes, as the same were before vested in the assignee or assignees as aforesaid; any thing in this act contained to the contrary notwithstanding."

In 1742, the time of passing the act, *Treville Cross* took the benefit thereof, and his estates were assigned to *Crossing*, who was afterwards removed by the Court of Common Pleas, and *John Clarke* appointed in his stead. *Clarke* continued in possession till his death, but made no sale or distribution, and died insolvent. *John Clarke*, his son and representative, was displaced by rule of Court of C. P., on the 4th of *May*, 1775, and *John Pring* was appointed assignee. Some years after this, *John Lethbridge*, Esquire, (afterwards Sir *John Lethbridge*, Bart.) filed a bill in chancery, claiming certain estates, which had been limited to *Treville Cross* in tail, under a *settlement of his grandmother, *Johanna Lethbridge*, and claims were also set up by [*406 other parties, as heirs at law, to such estates as had descended to *Treville Cross* from his mother, *Elizabeth Treville*. In this state of dispute as to the heirship, *John Pring* was removed by rule of Court of C. P., on the 10th of *May*, 1779, and Sir *John Lethbridge* was appointed assignee, who, having obtained possession under the rule of all the estates of *Treville Cross*, sold some parts, and continued in possession of the remainder, down to the time of his death, but never rendered any account. In the course of the proceedings in Chancery, an issue had been directed by that court to try the right between Sir *John Lethbridge*, and one claiming to be heir at law of *Treville Cross*. The suit was abated at Sir *John's* death, and had since revived against Sir *Thomas Lethbridge*, his son and heir, and personal representative. *Treville Cross* died many years since, and *Anthony Heathfield*, Esquire, the present applicant, and *Cross's* personal representative, took out letters of administration to his estate and effects in *February*, 1817.

Vaughan, Serjt., now moved for a rule, calling on Sir *Thomas Lethbridge*, Bart., to show cause why a new assignee of the insolvent's estates should not be appointed, and why an account should not be taken before the prothonotary of all sums of money received by Sir *John Lethbridge* in his lifetime, or by Sir *Thomas Lethbridge* since his decease, of or belonging to the insolvent's estate. He urged that the provisions of the act were imperative, that the assignee, after taking his own debt, should account for the residue; and that the suit in Chancery as to the heirship was irrelevant, because the act required the assignee to account to the insolvent's personal representative, on whose behalf he appeared in this case.

DALLAS, J.† After a lapse of nearly forty years since the appointment of the assignee, who has furnished the *ground for this motion, the court does not feel called upon to interfere. Where a statute directs a specific pro- [*407

ceeding in this or any other court, the meaning to be attached to such direction, is that the proceeding must be according to the practice of such court; and the practice of this court requires that such an application as my brother *Vaughan's* is should be made within a reasonable time.

PARK, J., of the same opinion.

BURROUGH, J. It is quite impossible to entertain the present application. Is this court to go into a long account forty years old? We refuse the motion.

Rule refused.

CRAWLEY v. IMPEY.

[2 Moore 460 S. C.]

A commission of bankrupt had issued against *A.* in 1808, under which he did not obtain his certificate. Another commission issued against him in 1815, under which he was imprisoned, and brought his action in K. B. against the commissioners for that imprisonment. At the trial, being unprepared with proof of the first commission, he was nonsuited. He then brought an action for the same cause in C. P., which court staid the proceedings in the latter action till the costs of the former should be paid.

TRESPASS for assault and false imprisonment had been brought in K. B. against the defendant, as a commissioner of bankrupt, in which action the plaintiff had been nonsuited; he afterwards commenced his action in this court for the same cause.

Vaughan, Serjt., on a former day, had obtained a rule *nisi* to stay proceedings in this case, till the costs in the former action in K. B. had been paid, and also to make the plaintiff give security for costs in the present action; and he cited *Melchart v. Halsey*, 3 Wils. 149. S. C. 2 W. Bl. 741.

*408] *Copley*, Serjt., now showed cause against the rule. A commission of bankruptcy had issued against the plaintiff in 1808, under which he never obtained his certificate. In 1815 another commission issued, under which he had suffered the imprisonment for which this action was brought. An attorney, in whose possession were the proceedings under the former commission, refused to produce them, unless a lien which he claimed were first discharged. The plaintiff was, therefore, unable to go into the merits of the former commission, and was nonsuited. As the merits were not entered into on the former trial, the proceedings cannot be stayed in this court, the practice of which differs in this respect from that of the Court of King's Bench. 3 Bos. & Pull. 23 n. *Tidd*. 556, 7th ed. And, in *Cook v. Dobree*, 1 H. Bl. 10, this court refused to stay proceedings, saying, that they could not on motion try the merits of the cause.

For the same reason, namely, that the merits did not come in question on the former trial, the plaintiff is not obliged to give security for costs in the present action.

Vaughan, in support of his rule, was stopped by the court.

GIBBS, C. J. Under the circumstances of this case, I can have no doubt that my brother *Vaughan's* rule ought to be made absolute. The defendant goes to trial with such preparation as every reasonable man would make for his defence. He goes down to trial on the merits, and the plaintiff ought to have gone down prepared to meet him on that ground, but, being unprepared to go into those merits, he is nonsuited. The plaintiff was in fault, for not providing himself with the necessary evidence. He knew, or ought to have known, whether he was in a condition to prove the case which he

relied on. The rule must be made absolute for staying the proceedings until the payment of the costs of the former cause.

PARK, J., observed that this point had been decided in *Grosvenor v. Cope*, in C. P.,† which was a case of trying the validity of a commission; and that the point had also been much considered and decided in a case from the western circuit.

Copley then contended, that at least the other part of the rule, viz. for security for the costs of this action, must be discharged, and that, therefore, he was entitled to the costs of this rule.

GIBBS, C. J. If the plaintiff had not shown cause against the other part of the defendant's rule, to which he is entitled, there might be some ground for the application. As the case stands there is none.

Rule absolute as above.

† Not reported.

*PIGEON, Widow, v. BRUCE and DOBSON.

[*410]

[2 Moore 462. S. C.]

It was sworn by the first of two deponents that he went to the *Fleet* prison, where the defendant was then in custody, for the purpose serving him with a *capias ad respondendum*, and that having found the defendant therein, he tendered to him a copy of the writ, at the same time showing the original writ, and explaining to the defendant the intent of the service; but that the defendant refused to take the copy, and walked away, whereupon the deponent following him, endeavoring to prevail on him to take the copy, but the defendant refused, and told the deponent, if he did not leave him, the deponent would get himself insulted, whereupon the deponent, fearing violence, desisted.

It was sworn by the second deponent that, on the evening of the same day, he went to the *Fleet* prison for the purpose of delivering the copy of the writ to the defendant; that he went into the deputy warden's office, and informed him what had passed in the morning, and requested him to have the defendant into the turnkey's lodge, that the deponent might personally deliver the copy of the writ to the defendant, and show him the original: that the defendant was called by the crier, but refused to see any body except in his room; whereupon the deponent offered to go there, but was prevented by the deputy warden, who said he might not escape with his life, and that the prison would be in an uproar; that it was impossible for the turnkeys to protect the deponent, but that if the deponent would leave the copy of the writ with the deputy warden, it should be given to the defendant on the following morning; that the deponent was informed, and believed that the defendant was discharged from the *Fleet* two days afterwards; that he had made frequent attempts to serve him at his dwelling-house; that the defendant could not be found, and that the deponent believed he secreted himself to avoid the service; and that the deponent had been informed by *Joseph Foulkes*, one of the turnkeys of the *Fleet* prison, that he, J. F., did deliver to the said defendant personally, in the prison, a copy of the said writ: Held, that this could not be deemed good service.

PELL, Serjt., moved that the service of the writ of *capias ad respondendum*, in this case, should be deemed good service on the defendant, and that an appearance should be entered, relying on the facts disclosed by the affidavits of two persons, by the first of whom it was sworn, that the deponent, on the 27th of April last, went to the *Fleet* prison, where the defendant, *Dobson*, was then in custody, for the purpose of serving him with a writ of *capias ad respondendum*, issued in this cause; and that, having found him in the prison, the deponent tendered and offered to him a copy of the writ, at the same time showing the original writ, and *explaining to him the intent of the service, but that the said defendant positively refused to take the copy of the writ, and [*411

turned from the deponent, and walked another way, whereupon the deponent followed him, and endeavored to prevail on him to take the copy of the writ, but the said defendant still positively refused to take the same, and told the deponent, that if he did not immediately leave him, the deponent would get himself insulted; and that the deponent, being apprehensive that he should get violently used by the said defendant, or by some of the other prisoners, left the prison.

By the second deponent it was sworn, that, on the evening of the same day, he went to the *Fleet* prison, for the purpose of actually delivering to the defendant, *Dobson*, the copy of the same writ, and went into the office of the deputy warden in the prison, and explained to the deputy warden what had passed in the morning of that day, as aforesaid; that the deponent requested the deputy warden to have the said defendant into the turnkey's lodge of the prison, in order that the deponent might personally deliver to the said defendant the said copy of the writ, and show him the original; and that the said defendant was accordingly called by the crier, but refused to come to the deponent, and sent word by the crier, that if any one wanted to see him, he might come into his room, as he would not come out of it; that thereupon the deponent offered to go inside the said prison, with a turnkey, to serve the said defendant, as aforesaid, but that the deputy warden positively refused to allow the deponent so to do, stating that the deponent would get most seriously injured if he attempted to do so, and perhaps not escape with his life, that the prison would instantly be in an uproar, and that it was impossible for the turnkeys to protect

*412] the deponent; but that, if the deponent would leave the copy of the writ with the deputy warden, it should be given to the said defendant on the following morning. It was then sworn, that the deponent did accordingly leave a true copy of the writ with the deputy warden, and that the writ was in the regular form, and was returnable on the morrow of the *Ascension* last past; that the deponent had since been informed at the prison, and believed that the said defendant was, on the 29th of *April* last, discharged out of the prison; that since that day the deponent had repeatedly endeavored to serve the said defendant at his dwelling-house and elsewhere, with a copy of the said writ, but that he could not find the said defendant, either at his said dwelling-house or at any other place; that he believed that the said defendant purposely secreted himself, to avoid being served with this writ; and that the deponent had since been informed by *Joseph Foulkes*, one of the turnkeys of the prison of the *Fleet*, that he, *Joseph Foulkes*, did, on the 28th of *April* last, deliver to the said defendant, personally, the said copy of the said writ, which the deponent left with the deputy warden, in the presence of the said *Joseph Foulkes*.†

GIBBS, C. J. It is quite another question what remedy you may have against any officer who interposes difficulties in your way, or prevents you from executing process: but we cannot say that this is service of process, when there is nothing to prove that the process has been served.

Rule refused.

† *Pell* stated that *Joseph Foulkes* had been applied to, to make affidavit of his service of the process, and that he had refused, saying that he was forbidden by the warden to do so; but there was no affidavit of this.

*CLEARS v. STEVENS.

[2 Moore 464. S. C.]

In *replevin*, the first cognizance averred a custom within a manor for the court leet to make regulations touching the commons, and the stocking thereof, and to order that, on breach, such penalty should be paid by the offender as to the jurors should seem meet; and a further custom that, on refusal to pay, a distress might be taken; it then averred an order of a court leet, that no person should keep, on the commons, any steers after two years old, on the penalty of 20s. a head, and justified taking the cattle, as being steers more than two years old, and being in the common damage feasant. The second cognizance justified taking the cattle damage feasant in the *locus in quo*, as the soil and freehold of the lord. The plaintiff pleaded to the first cognizance, that the cattle, at the time when, &c., were less than two years old, on which the defendant joined issue; and for plea to the second cognizance, the plaintiff prescribed for common appurtenant over the *locus in quo*, for such cattle as should be permitted by the bye-laws of the manor, and averred the like bye-law as in the first cognizance, and that after the bye-law, and before the time when, &c., he put his cattle, being steers less than two years old, on the common, and they remained therein feeding until, &c. The defendant replied that the cattle, at the time when, &c., were not less than two years old, on which issue was joined: Held, that the first cognizance was bad, because it did not aver any demand and refusal to pay the penalty before the distress taken, and that the plaintiff, therefore, was entitled to judgment *non obstante veredicto*, on the first issue.

2. Held, that the plea in bar to the second cognizance was bad, because it did not aver the age of the cattle at the time of the distress taken, and that the immaterial issue joined on that plea could not aid the imperfection thereof.
3. Held, that no repleader was to be awarded to the plaintiff as to the second issue.

REPLEVIN for taking three steers. The defendant in his first cognizance acknowledged the taking, as bailiff of *T. Thornhill, Esq.*, in *Hopton* common, in the county of *Suffolk*, which, at the time when, &c., was a parcel of the manor of *Hopton*, within the jurisdiction of the court leet and view of frank-pledge thereof, of which manor *Thornhill* was seised in fee, and had been accustomed to have a court leet or view of frank-pledge before the steward of the court for the time being. The defendant then averred a custom within the manor, that the jurors at the leet might make regulations and bye-laws touching the common, and the stocking and depasturing of the same with cattle; and might order and direct that, in case of any breach of the bye-laws, such penalty should be paid by the person or persons offending against the same, as to the jurors should seem meet: and also that it had been the custom, that a distress [*414] might be taken in case any person offending against the bye-laws should refuse to pay the sum which the jurors should direct to be paid by the party offending, and which should become due and payable by way of penalty for the breach of such bye-laws. The defendant further averred, that on the 29th of *April*, 1814, a court leet for the manor was duly holden, when it was ordered by the jurors there assembled, that no person should keep any Scotch steers, or home bred steers, upon any of the common pastures of the parish, or any steer after two years old, on the penalty of paying twenty shillings a head for every head of cattle. The defendant then further averred, that after the making the bye-law, the cattle in the declaration mentioned being steers more than two years old, were at the time, when, &c., in the *locus in quo* called *Hopton* common, eating up the grass and doing damage there to *Thornhill* in defiance of the bye-law, wherefore the defendant took them for a distress for the damage there done. In his second cognizance, the defendant justified the taking, because long before, and at the time when, &c., the *locus in quo* was the soil and freehold of *Thornhill*, and, because the cattle at the time when, &c., were in the *locus in quo*, eating up the grass and doing damage to *Thornhill*; wherefore the defendant, as his bailiff, took the same for a distress for the damage there then done and doing. Plea in bar as the first cognizance, that the cattle in the declaration mentioned, were at the time, when, &c., less than two years old, to wit, one year old. Issue thereon. As to the second cognizance, that the plaintiff was

seised in fee of a messuage in the parish of *Hopton*, and in the actual occupation thereof; that he had been accustomed, and of right ought to have common of pasture in the *locus in quo* for all such commonable cattle as he should be permitted to turn thereon *by the bye-laws of the manor; and that the *415] *locus in quo* was a waste or common within the jurisdiction of the court leet. The plea then admitted the seisin of *Thornhill*, and his rights, the holding of the court leet, and the order of the jurors, as set forth in the first cognizance: and the plaintiff then averred, that, after the making of that bye-law, and whilst he was seised of his said messuage, and before the time when, &c., he put and turned the cattle, in the declaration mentioned, being steers less than two years old, to wit, one year old, and being his own commonable cattle, in the *locus in quo*, to depasture on the grass there then growing, and to use the said common of pasture as he lawfully might; and that the cattle remained therein depasturing, until the defendant, of his own wrong, took and unjustly detained the same. Replication to this plea, that the cattle in the declaration mentioned, at the time when, &c., were not steers less than two years old, in manner and form as the plaintiff had in that plea alleged; and issue thereon.

At the trial before *Dallas, J.*, at the last *Suffolk* assizes, the question left for the jury was, whether the cattle at the time of the distress were more than two years old. Verdict for the defendant.

Blossel, Serjt., had obtained a rule *nisi* to enter up judgment for the plaintiff on both issues, *non obstante veredicto*, or to enter up such judgment on the first issue, and to have a repleader awarded on the last. He contended that the first cognizance would have been bad on demurrer, for the defendant had only alleged, that the steers were more than two years old at the time of the distress, and had neglected to aver that the penalty imposed by the bye law had been demanded of the plaintiff, and the payment refused by him. As, therefore, the *416] right to distrain only arose on non-payment *of the penalty imposed, the plaintiff was entitled to the judgment prayed for on the first issue. To the second cognizance, by which the defendant acknowledged the taking the cattle damage feasant, as the bailiff to the lord, the plaintiff had pleaded his right to turn cattle on the common conformably to the bye laws of the leet, and that the steers in question so turned on, were less than two years old, to wit, one year old. The defendant's replication to this, *viz.* that when they were taken they were not less than two years old, was, he contended, no answer to the plea, in which it should have been averred, that they were more than two years old, otherwise no breach of the bye laws is shown. The defendant, therefore, had tendered an immaterial issue; and the plaintiff, if not entitled to a judgment *non obstante veredicto*, was at least entitled to an award of a repleader on the second issue.

Frere, Serjt., now showed cause against the rule. The cattle in question were not taken as a distress for the penalty, but damage feasant. The second plea in bar admits, that the bye laws excluded any steer after two years old from depasturing on the common; and the first cognizance avers, that after the making of these bye laws, the steers in question being more than two years old, were depasturing on the *locus in quo*, and were distrained, damage feasant. And it cannot be denied that, under these circumstances, the steers became a surcharge for which the lord might distrain. [*Gibbs, C. J.* One difficulty occurs to us. There is no right to distrain either for a penalty or a breach of a bye law without a custom. The defendant in his first cognizance avers the right to hold a court leet, with a power in that court to make bye laws, to impose a penalty by reason of a breach of them, and on non-payment to *417] *distrain for the same; but it is no where averred that there has been a refusal on the part of the plaintiff to pay the penalty.] At common law the lord may distrain for a surcharge without a custom. [*Gibbs, C. J.* The right against the lord is to turn on any commonable cattle; that right can only

be regulated or narrowed by the custom, the custom in this case is, that the distress shall be levied on the non-payment of the penalty; and the defendant must take the whole custom, not merely that part of it which is convenient to his case.] Where a bye law defines what cattle shall be turned on a common, and inflicts a penalty for the breach of such law, it makes all other cattle trespassers; and if cattle above the age defined be turned on, it is a surcharge for which the lord may distrain, rejecting the right to impose the penalty and distrain for that. The defendant has put enough on this record to show that there was a surcharge, and that the distress was taken damage feasant. On the first issue, therefore, the defendant has a right to hold his verdict.

As to the second issue, the jury have by their verdict found that the steers were not less than two years old, and therefore the plaintiff is concluded by that. If it be urged that it would be consistent with the pleadings on the second issue, that the steers might be exactly two years old, it is granted that the issue is immaterial; but the defendant is betrayed into error by the plaintiff, who tenders this immaterial issue, by averring that the steers were less than two years old. [*Gibbs, C. J.* It is like the case of a plea, to debt on bond, of payment before the day, to which plea, if the plaintiff unadvisedly reply in the terms of the plea, the issue is immaterial.] The plaintiff is the first who makes the error, and the party who makes the first error in pleading, is not entitled to an award of repleader. *Webster v. Bannister*, Doug. 396, **Kempe v. Crews*, 1 Ld. Raym. 167, *Taylor v. Whitehead*, Doug. 749. On this second issue, therefore, the defendant is entitled to the judgment of the court.

Blosset, in support of his rule, being directed by the court to confine himself to the second point, thus argued. The plea in bar to the second cognizance is good, nor need such a plea pursue exactly the terms of a bye law in any case in which the proposition is not confined to a precise mathematical point. It is averred in the plea, that the steers were less than two years old, and that negatives the fact of their being more than two years old. The defendant should, in his replication, have selected and traversed the material fact, and have stated that the steers were more than two years old. [*Gibbs, C. J.* The custom is, that no one shall keep steers on the *locus in quo* after they are two years old, under a penalty. The plaintiff pleads, that when his steers were turned on the common they were less than two years old, but he says nothing of the age at which they were arrived, at the time of the distress.] The defendant by his replication cures that fault, for he avers that, at the time when, &c. they were not less than two years old; he might have demurred to the plea. [*Gibbs C. J.* There, I repeat, the plaintiff is in a dilemma, for he does not show the age of the steers when they were taken.] Then if the justification is not well pleaded, the trespass is confessed, and in such case the plaintiff has judgment on the trespass confessed, although he may have replied immaterially. *Broadbent v. Wilks*, Willes, 366, *Jones v. Bodinham*,† *Craven v. Hanley*, Barnes, 3d edit. 255, *Foster v. Jackson*, Hob. 56, *Comyn's Digest*, Pleader, [*419 M. 2, *Bonham's case*, 8 Rep. 120. b. *Turner's case*, Ibid. 133. b., *Meriel Tresham's case*, 9. Rep. 110. b.

GIBBS, C. J. This is an action of replevin, and the defendant in his first cognizance states, that the *locus in quo* is a common in the manor of *Hopton*, and that there hath been a custom for the lord to hold a court leet; and for the jurors at the leet to make regulations and bye laws touching the common, and stocking the same, and to impose a penalty on the violation of such regulations; and further that it had been the custom that, in case any person offending should neglect to pay the penalty, a distress might be levied on account of the breach of the bye laws. The defendant then avers the holding of a court leet, and an order by the jurors, that only cattle of a certain description should be kept on the common, and that, after the making of this bye law, the plaintiff put on the

† 1 Salk. 173. *S. C. Carthew*, 370, under the title of *Jones v. Bodinner*.

common cattle of a different description, wherefore the defendant, as bailiff to the lord, distrained them. This right of the lord to distrain cattle put on the common for a breach of the regulations made by the jury, can only be supported by the custom. Now this cognizance states in substance a distress by the lord for a breach of the regulations made by the jury, without stating any demand of the penalty from the plaintiff, or any refusal or neglect on his part to pay the same. The cognizance, therefore, does not pursue the custom, and is bad.

The defendant, in his second cognizance, justifies the taking, as bailiff to the lord, because the cattle in question were on the common damage feasant. The *420] *plaintiff in his plea in bar to this cognizance states, that he was seised in fee of certain premises in the parish of *Hopton*, and that he had been accustomed, and of right ought to have common of pasture in the *locus in quo* for all such cattle as he should be permitted to turn thereon by the bye laws; thereby confining his right of common to the regulation of the bye laws. He then shows that a bye law was regularly made, that no person should keep steers upon the common after two years old, under a penalty of paying twenty shillings a head; and avers that, after the making of the bye law, the plaintiff turned on the cattle in question, being steers less than two years old, to wit, one year old, on the common to feed as he lawfully might. The custom amounts to this, that no one shall keep cattle on the common which are more than two years old. The plea says nothing of the age of the cattle at the time the distress was taken, but is wholly confined to a statement of their age when they were turned on, which is laid at less than two years, to wit, one year; but, for any thing that appears on this plea, the cattle might have been three years old when they were distrained. This plea in bar is, therefore, bad. It is true, that the defendant in his replication selects an immaterial fact and takes issue thereon, but an immaterial issue taken on a bad plea will not make that plea good. The second cognizance is good, and as no good plea is pleaded in bar to that cognizance, the defendant is entitled to judgment thereon. But the first cognizance is bad.

Per curiam.

Rule absolute as to the first issue, and discharged as to the second.



*421]

*JACKSON et al. v. HALL.

[2 Moore 478. S. C.]

At the trial of a cause, a verdict was taken for the plaintiff, subject to a case for the opinion of the court of C. P. The case, as drawn for the plaintiff, was objected to by the defendant, on the ground that it excluded the only point intended to be raised. The counsel on both sides, (not of the degree of the coil,) then attended before the judge who tried the cause, who, after hearing them, and referring to his notes, decided that the case, as it stood, was correctly drawn. The defendant's and plaintiffs' junior counsel then signed the case, and the plaintiff obtained a serjeant's signature, and handed the case to the defendant's attorney for signature in like manner, that it might be argued. The attorney having refused, on the ground that he should compromise the question which his client intended to try, the court gave the defendant two days to obtain the proper signatures, and, on his non-compliance, ordered the *postea* to be delivered to the plaintiff.

At the trial of this case before *Wood*, B., at the last *Essex* assizes, a verdict was entered for the plaintiffs, subject to a case for the opinion of this court. The junior counsel on each side in the cause, differing as to the insertion of a certain fact, *Wood*, B., on reference to his notes, after hearing the counsel on

both sides, decided, that the case, as framed on the part of the plaintiffs, was correctly drawn; whereupon the junior counsel on both sides agreed to and signed the case as it stood. The plaintiffs then procured a serjeant's signature to the case, as a necessary preliminary step, and a copy was served on the defendant's attorney, requesting him to procure a serjeant's signature to the case on the defendant's behalf, that it might be put down for argument. This was declined by the defendant's attorney, on the ground, that the case did not contain certain material facts which had been proved at the trial, and which were necessary, in order to raise the point which he intended to try by this action, which was, whether the delivery of a writ of *feri facias* to the sheriff, out of his bailiwick, could bind the defendant's goods from the time of such delivery.

Copley, Serjt., had on a former day obtained a rule *nisi* for the *postea* to be delivered to the plaintiffs, with liberty to enter up final judgment thereon, pursuant to the verdict; and he urged, that if the court did not interfere in such a case, this expedient for getting rid of a special case and having a new trial, would be frequently resorted to. [422]

Bosunquet, Serjt., now showed caused. A party is advised to bring an action to try the question, whether the delivery of a writ of *feri facias* to a sheriff, out of his county, is binding; the stat. 29 Car. 2. c. 3. s. 16, enacting, that no writ of *feri facias* or other writ of execution, shall bind the property of goods, but from the time of delivery to such sheriff to be executed. The learned judge would not rule the point at the trial, otherwise the defendant might have brought his opinion in review before this court. In stating a case all the facts proved ought to appear. It is not pretended that the fact sought to be inserted was not proved; and, since the case excludes it, though it has been signed by the junior counsel, yet the attorney for the defendant is justified in declining to apply for the signature of a serjeant, as requested by the plaintiff, feeling that, by an acquiescence, he should compromise the whole question, which his client came to try.

Copley, in support of his rule, was stopped by the court.

GIBBS, C. J. As I understand the facts of this case, the parties went down to trial, no serjeant being of counsel at the assizes. A verdict was there taken for the plaintiff, subject to the opinion of this court, on a case reserved. A case was drawn by the plaintiff's counsel, which was not approved on the part of the defendant. The counsel on both sides then attended the judge, who referred to his notes, and, after hearing both parties, stated what he thought was the point to be decided in the case. The counsel whom the defendant had selected then signed that case. By the rules of this court, no case can be argued, unless it be signed by a serjeant for each party. The defendant refuses to obtain a serjeant's signature, although the plaintiffs' serjeant has signed. The defendant thus stands aloof, and says, I will not accede to the signature; for there is no doubt that any serjeant would have signed this case, because it had been settled by the only authority which could settle it, namely, by the authority of the judge before whom the cause was tried. The case, it is true, cannot be argued here without a serjeant's signature, but it is competent to this court to order the *postea* to be delivered to the plaintiffs, that they may enter judgment thereon, now that the defendant refuses to fulfil the agreement under which the parties drew their case. Unless, therefore, this case is signed on the part of the defendant, and delivered on or before *Friday* next, the rule must be absolute for the *postea* to be delivered to the plaintiffs. [423]

Rule absolute *sub modo*.

The conditions imposed by the court not having been complied with by the defendant, the rule was made absolute.

Postea to the plaintiffs.

*RIDGE et al. v. GARLICK et al.

[2 Moore. 481. S. C.]

A local turnpike act imposed specific tolls on carriages in proportion to the breadth of their wheels, such tolls being increased in proportion to the narrowness of the wheels, and being highest where the wheels were of less breadth than six inches: Held, that the carriages subject to such tolls were exempted from the additional toll imposed by the latter part of the twenty-third section of the statute 13 G. 3. c. 84, (General Turnpike Act,) and that the local act virtually repealed that section.

DEBT by the treasurers of the trustees of the turnpike road leading from *Cosham*, in the county of *Southampton*, to *Chichester*, on a bond given to them by the lessee of a turnpike gate on that road, and his sureties. The defendants cravedoyer of the bond and condition, which was for the due performance by the lessee of the covenants comprised in a lease of the same date with the bond, and made between the trustees of the road of the one part, and the defendant, *Garlick*, of the other part, and they set out the lease by which, (after reciting that, by the stat. 46 G. 3, intituled "an act for repealing two acts passed in the 2d and 24th years of the reign of his present majesty, for repairing the road from *Cosham*, in the county of *Southampton*, to the city of *Chichester*, and for the more effectually repairing the said road," power was given to the trustees, after giving notice, as therein mentioned, to lease the tolls granted by the said act for any term not exceeding three years, for the best rent that could be reasonably gotten for the same; and that the said tolls had been let by auction to the defendant, *Garlick*, for one year, as the highest bidder;) it was witnessed that the tolls were demised to *Garlick* for that term for 670*l.*; and it was provided, (among other restrictions,) that if *Garlick* should, at any time during the term, demand or receive for toll for the passage of any coach, &c. waggon, wain, cart, or other carriage, through the turnpike gate, any greater or less toll than the respective sums directed to be paid for such tolls by the said act, (except only where such tolls had been lessened by order of the trustees by virtue of their powers under the act,) or any toll for *articles exempted *425] by the act, or by any other of the laws and customs of the realm, the trustees might determine the demise upon giving notice as therein mentioned. *Garlick* then covenanted, that he would not at any time during the term demand or receive greater or less tolls than those stated in the proviso, nor at any time during the term, demand or receive for toll for the passage of any coach, &c. waggon, wain, cart, or other carriage through the said turnpike gate, any greater or less tolls than the respective sums directed to be paid for such tolls on the road by the said act, (except only when the tolls had been lessened or altered by order of the trustees, by virtue of their powers under the act, or other laws or statutes,) nor any toll for articles exempted by that act, or any other of the laws and statutes of the realm. The defendants then averred, that *Garlick* had not, at any time during the term, demanded or received for toll, any greater or less tolls, or sums of money than those stated in the proviso, and general performance by him of his covenants in the lease.

Second plea, that *Garlick* had not at any time during the term, demanded any greater or less tolls, or sums of money, than those stated in the proviso, (except as therein excepted,) and except where he had demanded and taken for divers waggons, carts and carriages, having the fellies of the wheels thereof of less breadth or gauge than six inches from side to side at the least, at the bottom or sole thereof, and for the horse or beasts of draught drawing the same, one-half more than the toll payable for the same respectively by the recited act, and under, and by virtue, and according to the form of the statute, 13 G. 3, in such case made and provided.

Replication as to the first plea; that by the act recited in the condition of the

bond, it was enacted, that the *after-mentioned tolls should be demanded and taken at the toll-gates or turnpikes erected, &c.; viz. for every four [*426 wheeled waggon, wain, cart, or other such carriage, having the sole or bottom of the fellies of the wheels thereof of less breadth or gauge than six inches, and drawn by four horses or other beasts of draught, the sum of one shilling and sixpence; and drawn by three horses or other beasts of draught, the sum of one shilling; and drawn by two horses or other beasts of draught, ninepence,† &c. For every two wheeled waggon or other carriage having the sole or bottom of the fellies of the wheels thereof of a less breadth or gauge than six inches, and drawn by four horses or other beasts of draught, the sum of one shilling; and three horses or other beasts of draught, ninepence; drawn by two horses or other beasts of draught, sixpence, &c.: which said tolls had not at the time of the making of the indenture, or since, been lessened by order of the trustees; nor was any thing in the first recited act expressly directed to the contrary. The plaintiffs then averred, that *Garlick*, after the making of the bond and during the term, demanded and received of *Wm. Simms* for the passage of a four wheeled waggon, having the sole or bottom of the fellies of the wheels thereof of less breadth or gauge than six inches, and drawn by four horses through the gate in the condition mentioned, a greater toll than one shilling and sixpence, directed to be paid for such toll by the first recited act, to wit, the sum of two shillings and threepence, contrary to the tenor and effect of the bond; and *this, &c. wherefore, &c. And, for a further breach of the condition, [*427 averred that *Garlick*, after the making of the bond and during the term, demanded and received of *W. Pricker*, for the passage of a two wheeled cart, having the sole or bottom of the fellies of the wheels thereof of a less breadth or gauge than six inches, and drawn by two horses through the gate, a greater toll than the sum of sixpence, directed to be paid by the said first recited act, to wit, the sum of ninepence, contrary to the tenor, &c. and this, &c. wherefore, &c. As to the second plea, the plaintiffs replied in substance in the same manner as they had done to the first.

Rejoinder as to the breach first assigned as to the first plea, that the waggon in the first breach mentioned, was a waggon having the fellies of the wheels thereof of less breadth or gauge than six inches from side to side at the least, at the bottom or sole thereof; and that *Garlick* did demand and receive for the said waggon and horses, as in the said first breach is mentioned, the sum of 2s. 3d., as, and being the amount of the two several sums of money following, viz. the sum of 1s. 6d. directed to be paid, and payable for toll in that behalf by the act in the condition of the said bond mentioned; and the further sum of nine pence (being one half more than such toll) directed to be paid by stat. 13 G. 3,† intituled, &c., and this, &c. And, as to the second breach, as to the first plea, that the cart in that breach mentioned was a cart having the fellies of the wheels thereof of less breadth or gauge than six inches from side to side at the least at the bottom or sole thereof; and that *Garlick* demanded and received for the said cart and horses the sum of ninepence, being the amount of the two several sums of money following, viz. the sum of sixpence, directed to be paid, and payable for toll in that behalf, *by the act in the condition of the said bond [*428 mentioned; and the further sum of threepence, being one half more than such toll directed to be paid in that behalf by the stat. 13 G. 3. General demurrer and joinder.

Hullock, Serjt., in support of the demurrer. The question is, whether the lessee is justified in taking the additional toll, and will depend on the operation

† 46 G. 3. c. 46. s. 15, which section also specifies the toll to be taken for four-wheeled and two-wheeled waggons, which had the bottom of the fellies of the breadth of nine inches, varying the toll according to the number of beasts of draught; and the toll to be taken for four-wheeled and two-wheeled waggons, which had the bottom of the fellies of the breadth of six inches, varying the toll according to the beasts of draught; the toll being increased in proportion to the narrowness of the wheels.

‡ General Turnpike Act.

of the twenty-third section of the general turnpike act on this local statute. The lessee is not justified in taking such toll. It is true, that section authorises the taking of additional toll for wheels of the dimensions stated in the pleadings, but this provision can only apply to those local acts which impose tolls of an equal rate on such waggons as have broad wheels, and such as have narrow wheels. The clause in the old local act for this road, 2 G. 3, and repealed

*429] 'by the 46 G. 3, now under consideration, imposed a general toll of one shilling on every waggon, cart, or other carriage, drawn by four horses; on every such carriage drawn by three, ninepence; and on every such carriage drawn by one, sixpence: and, during the operation of that act, there can be no doubt that every waggon with wheels of less than six inches in breadth, was, under the general turnpike acts, liable to the additional toll. But the present local act, in the fifteenth section, carefully specifies the breadth of the wheels of carriages liable to toll under it, and regulates the toll according to their dimensions, imposing the heavier toll on the narrow wheel. That section, therefore, operates as a virtual repeal of the twenty-third section of the general turnpike act, the only object of which was, to protect turnpike roads, by imposing a higher toll on narrow wheels, an object which is effectually attained by the additional toll imposed on such wheels by the present local act.

Faughan, Serjt., contra. The defendant, *Garlick*, was justified in taking the additional toll. By an express enactment, 21 G. 3, c. 20, all the provisions of the general turnpike act are extended to those local acts, which should thereafter be made; and the 46 G. 3, contains no express exemption from its operation. It is true, that part of the twenty-third section, which imposes double toll, on wheels exceeding a certain breadth, was first suspended for a time, by stat. 16 G. 3, c. 44, and was afterwards repealed by stat. 18 G. 3, c. 28; but the former part of that section giving the additional toll, remains untouched, and if it did not, the protection intended to be given by the legislature to turnpike roads, by imposing higher tolls on narrow wheels, would be rendered ineffectual.

*430] 'Local turnpike acts should be construed, with reference to the general turnpike act, as local inclosure acts are construed, with reference to the general inclosure act.

Hullock, in reply, was stopped by the court.

GIBBS, C. J. This is one of the plainest cases. It was observed when the general turnpike act was passed, that a provision was not usually made in local acts for putting a higher toll on narrow wheeled waggons than on those with broad wheels: the legislature, therefore, made a general prospective provision to supply the defect. This was borne in mind by the legislature on the passing of any subsequent local act, which imposed one uniform toll on all carriages of the same description without distinction as to the breadth of their wheels; and it was well known and understood, that in such an act of parliament, carriages

† "The trustees appointed by virtue or under the authority of any act of Parliament, made for repairing or amending turnpike roads, or such person or persons as are authorised by them, shall and are hereby required to demand and take, for every waggon, wain, cart, or carriage, having the fellicies of the wheels thereof of less breadth or gauge than six inches from side to side at the least, at the bottom or sole thereof, and for the horses, or beasts of draught drawing the same, one-half more than the tolls or duties which are or shall be payable for the same respectively:—and for every waggon, wain, cart, or carriage, having the fellicies of the wheels thereof of less breadth or gauge than six inches from side to side, at the least, at the bottom or sole thereof; and for the horses, or beast of draught drawing the same, from and after the twenty-ninth day of September, one thousand seven hundred and seventy-six, double the tolls or duties which are or shall be payable for the same respectively by any act or acts of Parliament made for amending or repairing turnpike roads, before any such waggon, wain, cart, or carriage respectively, shall be permitted to pass through any turnpike gate or gates, bar or bars, where tolls shall be payable by virtue of any such acts." 13 G. 3, c. 84, s. 23.

This act is repealed by stat. 3 G. 4, c. 126, intituled "An act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England," which also repeals the following acts: 14 G. 3, cc. 14, 36, 57, 82.—16 G. 3, cc. 39, 44.—17 G. 3, c. 16.—18 G. 3, cc. 28, 63.—21 G. 3, c. 20.—25 G. 3, c. 57.—52 G. 3, c. 145.—53 G. 3, c. 82.—55 G. 3, c. 119.—57 G. 3, c. 37.

with narrow wheels were in effect subjected to the higher toll imposed by the general turnpike act. But when we find it particularly enacted, what toll shall be paid by carriages having the bottom of the fellys of their wheels nine inches in breadth, what shall be paid by those having the bottom of the fellys six inches in breadth, and what shall be paid by those having the bottom of the fellys of a less breadth than six inches, the legislature has excluded the necessity of any reference to the general turnpike act: for it is impossible to say, that after the legislature has expressly directed what toll shall be paid in proportion to the narrowness of the wheels of carriages, the general turnpike act shall operate upon the tolls specified, and augment each of them half as much again. To contend for this, is to contend for too absurd a construction to be listened to by this court.

*DALLAS, J., expressed his opinion, that the fifteenth section of the 40 G. 3, operated here as a virtual repeal of the twenty-third section [*431 of the general turnpike act.

PARK, J., of the same opinion.

BURROUGH, J. The general turnpike act imposes a certain additional toll on narrow wheels, by way of penalty for the injury occasioned to roads by their use, and operates on those local acts in which a general toll is imposed on carriages without distinction as to the breadth of their wheels. But it can never be held to apply to those local acts in which specific tolls are imposed, increasing in proportion to the narrowness of the wheels of the carriages subjected to the operation of such local acts.

Judgment for the plaintiff.

CLARK et al. v. GASKARTH.

[2 Moore 491. S. C.]

1. Trees, shrubs, and plants, growing in the nursery ground, cannot be distrained for rent.
2. The word "product," in the eighth section of stat. 11 G. 2. c. 19, applies only to such products of the land as are subject to the process of becoming ripe, and of being cut, gathered, made, and laid up, when ripe.

TRESPASS for breaking and entering the closes of the plaintiffs, called *Lime Potts*, and the nursery ground at the parish of *Crosthwaite* in the county of *Cumberland*, and tearing up, digging up, &c., the earth and soil there; and digging up, cutting down, and carrying away the plaintiffs' trees, plants, roots and seeds, growing on the closes. Plea, general issue.

At the trial before *Wood, B.*, at the last *Cumberland* assizes, a verdict, with damages, was found for the *plaintiffs, subject to the opinion of the [*432 court on the following case.

At the time of committing the several acts alleged in the declaration, the plaintiffs were nurserymen, and carried on their business in partnership together at *Keswick* in *Cumberland*; and, before and at that time, they were the tenants, and in the occupation of the closes mentioned in the declaration, under the defendant, for a certain term, then and yet unexpired, at the annual rent of 19*l.* 19*s.* The plaintiffs used the closes in the declaration mentioned as nursery grounds, and, at the time of the alleged trespasses, the whole of such grounds had been, and were planted by the plaintiffs with young trees, shrubs, and plants, of the description mentioned in the declaration, for the purpose of sale, in the way of their business as nurserymen, and a great number of trees,

shrubs, and plants, of different sizes and ages, and belonging to the plaintiffs, were then growing on the same grounds.

At the time of the distress hereafter mentioned, the sum of 28*l.* 6*s.* was due from the plaintiffs to the defendant for rent, in respect of the nursery ground mentioned in the declaration; and such rent being so in arrear, the defendant, on the 19th of *February*, 1817, distrained all the growing trees, shrubs, and plants which belonged to the plaintiffs, and which were then growing in the nursery grounds, for such arrears of rent. Notice of distress was given by the defendant; and the property distrained was appraised by two sworn appraisers, according to the directions of the statute; and on the morning of the 24th of the same month, a sale by public auction, of the same trees, and shrubs, and plants, commenced by the direction of the defendant, upon the premises, for the purpose of raising the arrears of rent, and continued from day to day till and *433] upon the 4th of *March*, when the sale ceased. Several lots or parcels of the trees, distrained as aforesaid, were sold at the sale to purchasers, whilst such trees were growing, and before they had been taken up out of the ground, and such lots or parcels of trees were afterwards taken up from the ground by the respective purchasers thereof; and other lots or parcels of the trees distrained were sold after the trees composing such lots had been pulled up from the ground, by the direction of the defendant, after they had been seized and distrained in the manner aforesaid.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover. If the court should be of that opinion, the verdict was to stand; but if the court should be of a contrary opinion, then a nonsuit was to be entered.

The court now called on *Copley*, Serjt., to support the distress; and he contended that the defendant was justified under the stat. 11. *G. 2. c. 19. s. 8.*, which, after enumerating certain crops, empowered the landlord to seize as a distress any "other product whatsoever which shall be growing on any part of the estate demised." He urged that, as the trees and shrubs in question came within that description, and as they were the only available property on the land demised, they were well taken for the arrears of rent.

But the court were of opinion that the trees and shrubs could not be distrained; and held, that the word "product," in the eighth section of 11 *G. 2. c. 19.*, did not extend to trees and shrubs growing in a nurseryman's ground, but that it was confined to products of a similar nature with those specified in that section, to all of which the process of becoming ripe, and of being cut, gathered, made, and laid up when ripe, was incidental.

Judgment for the plaintiffs.†

Hullock, Serjt., was to have argued for the plaintiffs.

† [See *Post* 742, & 3 *Moore* 114, *Clark v. Calvert*, where the above decision is recognised and adopted.]

*434]

*BADDELY v. SHAFTO.

The defendant executed a warrant of attorney to enter up judgment, with the usual release of errors and defeazance, and signed an undertaking, written beneath the defeazance, that no writ of error should be brought. The plaintiff revived the judgment by *scire facias*, to which the defendant pleaded, and the plaintiff had judgment, whereupon the defendant brought a writ of error, which the Court of C. P., on motion, set aside; the defendant having contended, first that this was a release of error, and ought to have been pleaded; and, secondly, that it did not apply to the judgment on the *scire facias*.

The defendant had given to the plaintiff a warrant of attorney to enter up judgment, with a release of errors in the common printed form. On the back

was the usual defeazance, and the following undertaking signed by the defendant: "and I do hereby undertake, that no writ of error shall be brought, nor bill in equity filed to reverse the said judgment." Default having been made, and the time for entering up judgment having expired, the plaintiff sued out a writ of *scire facias* to revive the judgment to which the defendant pleaded. The cause was tried and the plaintiff had judgment; upon which the defendant brought a writ of error.

Lens, Serjt., had obtained a rule *nisi* to have the writ of error set aside, and the plaintiff's costs paid by the defendant. And

Best, Serjt., now showed cause. 'This motion is founded on the defendant's having executed a release of errors, and even supposing it to apply to the judgment last obtained by the plaintiff, he ought to have pleaded it, and he cannot take any advantage of it on motion, *Lundon v. Pickering*, 2 Str. 1215. But the release of errors applies only to the judgment entered upon the warrant of attorney on which the release appears; while the judgment sought to be vacated, is that obtained upon the *scire facias*. 'The defendant, therefore, [**435** is not barred of his writ of error on that judgment.

Lens, in support of the rule. 'The defendant's argument is founded on the supposition, that the point in dispute arises on the release of errors; whereas the plaintiff relies on the defendant's express undertaking, and his breach of faith in taking out the writ of error contrary to the undertaking, *Cates v. West*, 2 T. R. 183, *Executors of Wright v. Nutt*, In error, 1 T. R. 388. As to the other point made by the defendant, *Ashurst, J.*, lays it down in the last cited case, that a *scire facias* is no new action, but a mere continuance of the old action.

GIBBS, C. J. The rule must be made absolute.

Per curiam.

Rule absolute.



WILLIAMS v. JOHN PEARCE HOCKIN and HANNAH READ.

1. An attorney, before whom, as a commissioner, an affidavit had been sworn in the country, had been the legal adviser of one of the deponents, and had, in *London*, told the party really interested in the cause for which the affidavit was sworn, that he intended to move the court in that cause, in which, however, he was not the attorney. The court held, that this formed no objection to the affidavit, which was accordingly received.
2. The court set aside the securities for an annuity after a lapse of six years, for two of which it had been paid, on the ground that the consideration money was not the property of *W.* as stated in the securities, but of *C.*, and that the name of the person, on whose behalf the money was paid, was not truly set forth in the receipt thereon, *C.* being alive, and having claimed the consideration money and the annuity as his own.

LENS, Serjt., on the first day of this term, had obtained a rule *nisi*, that a bond, (dated *April*, 1812,) warrant of attorney, and judgment thereon, for securing *an annuity of 200*l.* per annum, (which had been paid for the first [**436** two years,) might be declared void, and vacated, and that the sums levied in execution, (in 1816,) might be returned, upon the ground that the consideration money was not the proper money of the plaintiff, as stated in the securities, but of *C. Carpenter*, and that the real name of the person by whom, and on whose behalf the consideration money was paid, was not truly set forth in the receipt on the bond, wherein it was stated, that the consideration money was paid by the plaintiff, whereas it was paid by *T. Wingate*, and whereas a part of the consideration money was in fact retained by *C. Carpenter*, the real purchaser, under pretence of payment for a previous debt, alleged to be due from the defendant, *Hockin*, the joint grantor, to *Carpenter*.

The affidavit of the defendant, *Hannah Read*, and *Thomas Norris*, discloses

ing these facts, and that *Carpenter*, (who was alive at the time of the motion,) had frequently asserted both orally and by letters appended to the affidavit, and referred to therein, that the annuity was his own, and purchased with his money, was sworn at *Oakhampton*, in the county of *Devon*, before *Thomas Bridgman Luxmore*, a commissioner.

Best, Serjt., now took a preliminary objection to the reception of this affidavit, on an affidavit of *Carpenter*, which stated, that *Luxmore of Oakhampton*, before whom *Read's* and *Norris's* affidavit was sworn, had called in company with *Norris*, on the deponent in *New Inn*, and said that he (*Luxmore*,) was about to move to set aside the annuity; and that the deponent had seen letters written by *Hannah Read*, to the said *Luxmore*, as her friend and legal adviser.

Lens and *Pell*, Serjts., for the defendants, put in an affidavit that *Charles *437] Luxmore, of Red Lion-square*, was *the agent, and that the attorney in the cause was *Norris*.

Best, then contended that it was clear that the commissioner had been the legal adviser of the party whose affidavit he had taken, and that he had called on *Carpenter* as the attorney in this cause, he having expressly told *Carpenter* that he intended to move; and that, therefore, such affidavit could not be received by the court.

GIBBS, C. J. We are of opinion that there is no objection to this affidavit being received; for the rule only says, that the affidavit shall not be sworn before the attorney in the cause. Though the commissioner may have been *Hannah Read's* adviser on other occasions, yet he may not be so in this cause; and it is sworn that he is not. His saying that he would move in the cause will not bind *Hannah Read*, as his client.

Best, then showed cause against the rule; and, not denying that the consideration money was *Carpenter's*, urged that the plaintiff had come too late, for the annuity was granted early in the year 1812. He admitted that where the defect was manifest on the record, lapse of time was no bar to a motion for setting it aside; but he contended that, according to *Ex parte Maxwell*, 2 East, 85, the facts disclosed by affidavit were insufficient to set aside the securities for this annuity, after a lapse of six years, for two of which the payments had been made.

Lens and *Pell*, in support of the rule, were stopped by the court.

**GIBBS, C. J.* The case of *Ex parte Maxwell*, meets our full ap-
*438] probation, because there the motion was made on extrinsic facts, after the person best able to give an account of the transaction was dead; and moreover, after a lapse of more than six years after his decease. In this case Mr. *Carpenter*, is still living, and he fairly comes forward, and says, in effect, that the transaction is as it is stated on the part of the defendants. We are, therefore, relieved from all difficulty in this case, and the rule must be made

Absolute.†

† See *Ex parte Mackreth*, 8 East, 583, and *Mootham v. How*, 7 Taunt. 596.

LIDBETTER, Plaintiff; BARTON et ux., et al., Deforciant.

Fine, the date of which was not sworn to, but which had been rejected by the officers as out of time, suffered to pass on affidavit that, after the due taking of the acknowledgments, the papers had been laid aside and forgotten in the office of the attorney, one of the deforciant, and that all the parties were alive.

BEST, Serjt., moved that this fine, the date of which was not sworn to or stated, but which had been rejected by the officers as being out of time, might

pass, on an affidavit that the whole of the papers, after the due taking of the acknowledgments, had been laid aside and forgotten, in the office of the attorney, who was also one of the deforciant, and at whose instance *Best* now made the application. All the parties were alive.

By the court.

Fiat.

*COKE et al., Executors of CRICK, v. BRUMMELL and RADCLIFFE. [*439]

[2 Moore 495. S. C.]

A. and B. gave a joint and several bond, and a warrant of attorney for jointly and severally confessing judgment thereon to C. for securing an annuity, payable by B. to C. After execution by A. and B., an omission of one of the Christian names of A. in the bodies of the instruments was discovered, and was supplied by interlineation by the attorney of the grantee; and the instruments so altered were re-executed by A., but not by B. A. was sued on the bond in K. B., pleaded the judgment, and defeated the action. The Court of C. P. refused, on motion by A., to set aside the securities; *first*, because he had assented to the alteration; and, *secondly*, because he had recognised the validity of the judgment by pleading it.

ON the 5th of November, 1800, the defendant, *Radcliffe*, (whose name was then *Emilius Henry Delme*, and who had since taken the surname *Radcliffe*) at the request of *Brummell*, joined him in giving a joint and several bond, and a warrant of attorney, by which the defendants were jointly and severally to confess judgment thereon, to secure the payment of an annuity of 60*l.* to *Crick*, the testator. By these instruments, it appeared that *Crick* had contracted with *Brummell* for the purchase of the annuity, to be payable quarterly to *Crick* during the joint lives of the defendants and the survivor, for 360*l.*, to be secured by the bond of *Brummell* as principal, and of *Radcliffe* as his surety, and also by their warrant of attorney. Some days after the defendants had executed these instruments, *Crick's* attorney requested *Radcliffe* to re-execute the same, stating, that when the instruments were executed, *Radcliffe's* name had been written in the bodies of them "*Emilius Delme*" only, and that he, having observed, previously to the enrolment, that *Radcliffe's* signature was "*E. H. Delme*," had afterwards interlined the word "*Henry*," (which he had learned was also his name,) as part of *Radcliffe's* name, throughout the instruments. *Radcliffe* re-executed the instruments, but *Brummell* did not. Judgment was entered up on the warrant of attorney in *Michaelmas* term, 41 G. 3, against both *defendants. In *Michaelmas* term, 1817, an action was brought against *Radcliffe* on the bond in K. B., to which he pleaded judgment [*440] recovered by *Crick* in his lifetime against him jointly with *Brummell*, on which issue was joined; and the roll not having been carried in on entering up judgment, nor at the time of plea pleaded, *Radcliffe* had an entry made of the judgment on the warrant of attorney; and on a day being given to produce the record, an office copy of the entry was produced, and he had judgment.

Lens, Serjl., on a former day, had obtained a rule *nisi* to set aside the judgment and the warrant of attorney on which it was founded, on the grounds that the insertion of the name *Henry* was a material alteration, and that, at all events, as it had been done at the instance of the grantee, it invalidated the securities: that the grantee, having omitted to procure *Brummell's* re-execution after the alteration, *Brummell* was discharged, and if *Radcliffe* should be compelled to pay the whole of the annuity, no suit for contribution would be avail

able against *Brummell*; and so there could be no joint judgment: and he cited *Pigot's case*, 11 *Rep.* 27.

Vaughan and *Pell*, Serjts., now showed cause against the rule. The defendant, *Radcliffe*, is estopped from contending that this is not a valid judgment against *Brummell*. He has assented to the alteration; he has pleaded the judgment, and insisted on its validity on his record; and has availed himself of it to defeat the action brought against him on the bond. This is an application to the discretion of the court, who will not, after his proceedings, permit him to dispute, on motion, the validity of the securities on which the judgment was *441] founded, but will leave him to plead the objections to the *scire facias*, which is now pending.

Lens and *Best*, Serjts., in support of the rule. The joint judgment is vacated, the two parties never having jointly executed the same instrument. It is also vacated because the bond and warrant of attorney have been altered; and the alteration of an instrument, even in an immaterial part, renders it invalid. The plaintiffs may recur to the bond as a severalty, but they can recover on no joint bond; for there is none. This objection cannot be taken advantage of on the *scire facias*, wherein the plea of *non est factum* to the original bond, upon which the judgment is entered, cannot be pleaded.

Gibbs, C. J. This is an application to the court to set aside a judgment, and the warrant of attorney on which that judgment is founded, which was given as a collateral security on a bond for the payment of annuity, entered into by *Brummell* as principal, and by *Delme* as his surety. After the execution of the instruments by both parties, the attorney who prepared the securities discovered that *Delme*, whose name throughout the bodies of the bond and warrant of attorney was written "*Emilius Delme*;" but who had signed the same with the initials *E. H.* before his surname, had also the additional name "*Henry*." The attorney then interlines the name "*Henry*" between the words "*Emilius*" and "*Delme*," wherever the omission occurred, and explains the alteration to *Delme*, who re-executes the instrument so altered. The warrant of attorney was, I think, perfectly good without this alteration. But we are relieved from this consideration by *Radcliffe* himself, for he assents to this alteration. Further than this, *Radcliffe* himself pleads this judgment to an action brought against *442] him on the bond in the Court of King's Bench; and, having recognised its validity when it suited his purpose, and having used it for the purpose of defeating that action, he now comes to this court, and seeks to set it aside, together with the warrant of attorney, on which it was founded.

We are of opinion that we cannot do this. First, because he assented to the alteration. Secondly, because he has himself pleaded this judgment; and now enjoys a judgment obtained by means of this very record.

The rule, therefore, must be discharged.

Rule discharged.

INGLIS, Plaintiff; HEALD, Deforciant.

Fine, of *Trinity*, 1814, not suffered to pass, all the parties being alive, there being no affidavit stating that the papers were mislaid, or assigning other reason for the delay.

HULLOCK, Serjt., moved that this fine, the writ of covenant in which was returnable in *Trinity* term 1814, all the parties being alive, but no reason being assigned for the delay, might pass.

The court, after inquiring whether *Hullock* was prepared with any affidavit to show that the papers had been mislaid by the attorney or others, and being answered in the negative, rejected the application.

Rule refused.†

See p. 438.

*In the Matter of WEBB, WALLINGTON, BROWN, and BRICE. [*443]

[2 Moore 500. S. C.]

A., B., C., & D., in partnership as carriers, agreed with *S. & Co. of Frome*, to carry goods from *London* to *Frome*, where they were to be deposited in a warehouse belonging to the partnership at *Frome*, where *A.* resided, without any charge for warehouse-room, till it should be convenient to *S. & Co.* to take the goods home. Goods of *S. & Co.* carried by the partners from *London* to *Frome* under this agreement, were deposited in the warehouse at the latter place, and destroyed by fire: Held, that the partners were not liable to *S. & Co.* for the value of the goods burnt; and that *A.*, having paid the amount of the loss to *S. & Co.*, had paid it in his own wrong, and was not intitled to contribution from his partners.

AN award recited, among other things, that differences and disputes had arisen between *Wallington, Brown, & Brice, & Webb*, touching their liability to make good to *Webb* a portion of a loss, sustained in consequence of wool, (then belonging to Messrs. *Shepherds*, clothiers, of *Frome*, which had been delivered to *Webb, Wallington, Brown, & Brice*, as carriers,) having been accidentally burnt, and which loss *Webb* had paid and made good to Messrs. *Shepherds*, and stated that the arbitrator thereby awarded that *Wallington, Brown, & Brice* were liable to make good a certain portion of such loss to *Webb*, amounting to the sum of 633*l.*, and that he had accordingly given credit to *Webb* for the same in account with *Wallington, Brown, & Brice*, in awarding the sum due from *Webb* to *Wallington, Brown, & Brice*, and had deducted such sum from the sum which would otherwise have been due from *Webb* to *Wallington, Brown, & Brice*. But, inasmuch as *Wallington, Brown, & Brice* were desirous to have the opinion of this court whether they were so liable, he had, with the consent of the parties, stated the facts relating to the wool, which were, in substance, as follow:

Until the 25th of *May*, 1816, *Webb, Wallington, Brown & Brice*, carried on the business of common carriers from *London* to *Frome*. One portion of the profits arising from such business was, by their agreement, to belong to *Webb*, and the remaining portion jointly to *Wallington, Brown & Brice*; and any loss arising from the business was to be borne in the same proportions. *Webb* resided at *Frome*, where he possessed stables and warehouses of his own, which were used for the purposes of the joint trade. A policy of insurance was effected by *Webb*, on these premises and their contents in his own name for 500*l.*, the premium for which he paid out of the partnership funds. *Wallington*, resided in *London*, where he possessed premises of his own, which were used for the purposes of the partnership; he insured them in his own name, and paid the premium out of the partnership funds. These premiums were mutually acknowledged by the partners in the settlement of their accounts, to have been properly paid out of the partnership funds. Before the existence of this partnership, Messrs. *Shepherds*, employed *Webb*, who was then a carrier, to carry for them, from *London* to *Frome*, a part of the wool

used by them in their trade as clothiers, and they continued to employ *Webb, Wullington, Brown & Brice*, as carriers after the partnership, in the same way, and to the same extent, that they had employed *Webb*, before that event. After the partnership, and a considerable time before the fire, after mentioned, Messrs. *Shepherds*, entered into an agreement with *Webb*, on behalf of *Webb* and his partners, and which was recognised by his partners, that Messrs. *Shepherds*, would employ *Webb & Co.* to carry a larger proportion of their wool than they then did, in consideration that they would undertake to receive the wool they should bring from *London* to *Frome*, for Messrs. *Shepherds*, into their warehouses when it was not convenient for Messrs. *Shepherds*, to take it into their own, and to keep it there until it should be convenient for Messrs. *Shepherds*, *445] to take it home, without *charging Messrs. *Shepherds*, any thing for warehouse room, or in any other respect for the keeping of such wool, and, in consequence of this agreement, Messrs. *Shepherds*, did employ *Webb & Co.* to carry an increased quantity of their wool, by which an increased profit accrued to the partnership of *Webb & Co.* The following was the course of Messrs. *Shepherds* trade with respect to their wool. When their correspondents in *London*, bought wool there, they sent it to *Webb & Co.*'s warehouses in *London*, to be forwarded by their waggons to *Frome*, when it should suit them. *Webb & Co.* accordingly sent it forward at their own convenience. On the arrival of the wool at *Frome*, it was always sent home to Messrs. *Shepherds*, without delay by *Webb*, the resident partner, unless he received notice from Messrs. *Shepherds*, that it was not convenient for them to receive it. When Messrs. *Shepherds*, received advice of wool being sent by the waggon from *London* to *Frome*, or of its arrival at *Frome*, if their warehouses happened to be so full that they could not conveniently receive it there, they sent notice to *Webb*, (as the resident partner) of that fact, and that he was not to send it home to Messrs. *Shepherds*, but to house it in *Webb & Co.*'s own warehouses until he received notice from Messrs. *Shepherds*, that they were ready to receive it. If Messrs. *Shepherds*' warehouses were full when any parcel of wool reached *Frome*, they did not send notice to *Webb*, to bring any part of it home until their warehouses were so far emptied as to be capable of holding the whole parcel that was at *Webb & Co.*'s. There was nothing said by Messrs. *Shepherds* or *Webb*, at the time this agreement was made, as to the party at whose risk the wool was to remain while it was deposited in *Webb & Co.*'s warehouses. The usual time which Messrs. *Shepherds*' wool continued in *Webb & Co.*'s warehouses was between a fortnight and a month; but *very *446] seldom for a month. Messrs. *Shepherds*, never paid any thing to *Webb & Co.* for keeping their wool for them: *Webb & Co.* considered themselves sufficiently recompensed by the increased quantity of wool given to them to carry; and, in fact, *Webb & Co.* did receive considerable profits from this agreement. About the 11th of *May*, 1816, a quantity of wool belonging to Messrs. *Shepherds*, was brought by *Webb & Co.*, as carriers, from *London* to *Frome*, and it not being convenient for Messrs. *Shepherds*, to receive it in their own warehouses, they sent notice to *Webb*, as the resident partner, of that fact, and that he was not to send it home to Messrs. *Shepherds*, but to house it in the warehouse of *Webb & Co.* The wool was accordingly put, as was usual in such cases, into the warehouses of *Webb & Co.*, which were insured as before mentioned; and it remained there until the 21st of *June*, 1816, when the warehouses, and a considerable part of the wool, were destroyed by accidental fire. On the 25th of *May*, 1816, while the wool remained in their warehouses, and before the fire, the partnership of *Webb & Co.* was dissolved by mutual consent generally, without making any provision for their outstanding debts or demands, and without any reference to this wool. Notice of the dissolution was given to Messrs. *Shepherds*, about the time of its taking place, and a considerable time before the 21st of *June*. It had not been convenient for the Messrs. *Shepherds*, to receive this wool into their own warehouses at any time between its arrival

and the time of the fire. On the wool being burnt, Messrs. *Shepherds*, called upon *Webb*, as resident partner of *Webb & Co.* at *Frome*, for payment of the value of the wool, and threatened to bring an action for the amount, unless it was immediately paid. In consequence of this, *Webb*, having, in the interval, received the sum of 500*l.* from the underwriters on the policy above mentioned, paid 400*l.* thereof to *Messrs. *Shepherds*, in part of payment of the value of the wool burnt, and either paid or gave Messrs. *Shepherds*, security for the residue of the value. In consequence of this, Messrs. *Shepherds*, pending the reference, gave a release dated 17th of *April*, 1817, to *Wallington, Brown, & Brice*, of all demands which Messrs. *Shepherds*, had against them in respect of this wool. [*447]

Upon these facts *Webb*, contended that he and his partners being liable to pay to Messrs. *Shepherds*, the value of the burnt wool, he was not solely responsible, but that his former partners, *Wallington, Brown, & Brice*, were liable to bear their proportion, and pay it to him, he having satisfied Messrs. *Shepherds*, and they having released *Wallington, Brown, & Brice*, from all responsibility to them.

On the other hand, *Wallington, Brown & Brice*, contended that Messrs. *Shepherds*, were not entitled to recover the value of the burnt wool at all, and that, if they were, they were only entitled to recover from *Webb*.

The arbitrator, in case the court should be of opinion that *Wallington, Brown & Brice*, were not liable to make good their proportion of the loss sustained, awarded that *Webb*, should, at the expiration of a month next after the court should have declared their opinion, pay to *Wallington, Brown, & Brice*, at *Webb's* house, on the same being demanded, the further sum of 633*l.*; and that the costs of the application to the court should be paid as the court should direct.

Lens, Serjt., on a former day, had moved for a rule nisi to set aside so much of the award as declared that *Wallington, Brown, & Brice*, were liable to make good a certain portion of the loss of the wool burnt, on the ground that the decision of the arbitrator was contrary to law upon the facts stated in his award. The court *granted the rule, and referred to the case of *Rugg v. Minett*, 11 East, 210, observing, that it did not appear that the arbitrator was of opinion that *Wallington, Brown, & Brice*, were liable to make good a portion of the loss by fire to *Webb*, but that he had merely so put the point as to raise the question. And now, [*448]

Copley, Serjt., showed cause. The question is, whether, under the circumstances, *Webb*, is entitled to contribution from his former partners for the sum which he has been called on to pay on account of this loss. He is entitled to such contribution. If *Webb & Co.* held their goods as carriers, and it is clear that they did so, they are liable for the loss; for the goods had not arrived at the place of their ultimate destination, but were in an intermediate stage, it being the duty of *Webb & Co.* to deliver them to the warehouses of Messrs. *Shepherds*. If a carrier in any intermediate stage put the goods under his care in a warehouse for his convenience, they are in his holding as carrier, as much as if his boat were moored with them on board, or his waggon in which they are loaded, were put up on the road. *Hyde v. The Trent and Mersey Navigation Co.* 5 T. R. 389. In the case of *Garside v. The Proprietors of the Trent and Mersey Navigation*, 4 T. R. 581, the decision rested on the fact that the duties of the defendants, as carriers, had ceased; but, in this case, the duties of *Webb & Co.*, as the carriers of this wool, had not ceased; and nothing can turn on the distance between the respective warehouses of Messrs. *Shepherds*, and *Webb & Co.*

Secondly. Here are four persons in partnership at the time when the goods come into their possession; and, assuming that the claim of Messrs. *Shepherds*, was not a claim which could, at law, be established against *them, yet, if under the threat of an action, one of the partners, situated as *Webb* [*449]

was, pays such a claim, he pays it in the exercise of that discretion which every partner must possess ; and he is entitled to treat it as a partnership transaction, and to have contribution.

Lens, Best, and Pell, Serjts., who were to have supported the rule, were stopped by the court.

GIBBS, C. J. With respect to the second point made by my brother *Copley*, in this case, *Wullington, Brown, & Brice*, could only be answerable to *Webb*, for money paid by him, on the ground that they had expressly desired him to pay the money to their use, or on the ground that it was better that he singly should pay at once than to wait for execution against all. Now, whether he could be obliged to make this payment depends on the question whether *Webb & Co.* had these goods as carriers or warehousemen ; for this is a loss which would fall on them as carriers, if they were acting in that character, but would not fall on them as warehousemen, if they were acting in the character of warehousemen. The Messrs. *Shepherds*, employed them to carry goods from *London to Frome*, and, if any loss had happened in that transit, *Webb & Co.* would have been liable. In the midst of these transactions a new agreement was made, that the Messrs. *Shepherds*, and *Webb & Co.* should not deal as before ; but that *Webb & Co.* should, on the arrival of the goods, retain them in their warehouses at *Frome*, without charge, until notice from the Messrs. *Shepherds*, that they were ready to receive them. The consequence is, that the character of *Webb & Co.*, as carriers, was suspended from the time of the arrival of the goods at *Frome*, until their delivery to the Messrs. *Shepherds* ; and that, during such interval, though the duty of *Webb & Co.*, as carriers, was not discharged, *450] they were not liable as carriers. The effect then is, that the Messrs. *Shepherds*, could not have recovered that money against *Webb & Co.*, as carriers, which they could not have recovered against them as warehousemen. *Webb*, therefore, has paid this money in his own wrong, and cannot charge it to his partners.

DALLAS, J., and PARK, J., concurred in the judgment, on the ground that *Webb & Co.* had completed their duty as carriers, the goods having arrived at the place of their destination ; and that *Webb & Co.* therefore stood in the relation of warehousemen only to the Messrs. *Shepherds*, at the time of the loss.

BURROUGH, J. I am of opinion that the duty of *Webb & Co.*, as carriers, was suspended by the special contract between them and the Messrs. *Shepherds*, and that the goods were in the custody of *Webb & Co.*, not in their capacity as carriers, but under that special contract.

Rule absolute.

COOKE v. TANSWELL.

[2 Moore 513. S. C.]

The declaration in covenant on an indenture of apprenticeship averred that the deed was in the possession of the defendant, who pleaded *non est factum*. At the trial, the deed was proved to be in the hands of the defendant, who had received notice to produce it, the notice stating the name of the subscribing witness. On non production of the deed, the plaintiff gave parol evidence of its contents, without calling the subscribing witness, who was in court : Held, that the parol evidence was well received.

COVENANT on an indenture of apprenticeship, with an averment in the declaration that the indenture was in the possession of the defendant, and, therefore,
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could not be produced by the plaintiff. Plea, **non est factum*. At the trial before *Burrough, J.*, at the sittings for *Westminster*, after the last term, it was proved that the deed was in the hands of the defendant, to whom notice, specifying the name of *Pain*, as that of the subscribing witness, had been given to produce it. The plaintiff, on the defendant's refusal to produce the deed, gave in evidence what was supposed to be a copy of it, on which the name of the subscribing witness was apparent; but, on its turning out that this paper was not a copy, the plaintiff abandoned it and gave parol evidence of the contents of the original without calling the subscribing witness who was in court. For the defendant, it was contended that the plaintiff had failed in his proof, and that the attesting witness should have been called. But *Burrough, J.*, was of opinion, that the proof was sufficient without the evidence of the subscribing witness. [*451]

Lens, Serjt., on a former day, had obtained a rule *nisi* to set aside this verdict, and enter a nonsuit on the ground urged at the trial. And

Copley, Serjt., *contra*, was stopped by the court, who called upon

Lens and *Bosanquet*, Serjts., and they argued thus in support of the rule. The subscribing witness was in court and might have been produced, and the general rule, which is imperative for the production of such a witness, applies in full force to this case. The rule is so strictly observed, that not even the admission of an obligor that he executed a bond, will dispense with its operation.† A fact may be known to the subscribing *witness, not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness, relative to the transaction;‡ and in this case, the subscribing witness might have proved that the instrument in question was delivered as an escrow. The rule has been held to apply even to the proof of a cancelled deed;§ and though in the case of a deed lost or burnt, the court will admit a copy or counterpart, or the contents to be given in evidence, yet they never permit it, except it be proved that there was such a deed executed.¶ *Ellenborough, C. J.*, in *The King v. Harringworth*, says, "The only question is, whether the parties who seek to prove the execution of this indenture, must not make their way to what may be called secondary proof, through the medium of those witnesses who are the plighted witnesses to the transaction, by first disposing of their testimony. If there ever was a case in which the rule might reasonably have been relaxed, it surely was the case of *Abbot v. Plumbe*, 4 M. & S. 353, yet, in that case, the court held the rule to be inexorable, 1 Doug. 216. [*452]

Copley, was heard in reply on the cited cases, the application of which to this case he denied; and he observed that, on the parol evidence on which alone the plaintiff, having abandoned the supposed copy, rested his case, it did not appear that there was any subscribing witness to the deed. [*Burrough, J.* I did not decide the case at *Nisi Prius*, on the ground that the name of the subscribing witness could only be known by reference to the supposed copy. It appeared at the trial, that *Pain's* name was on the indenture as the subscribing *witness, and I decided the case with the knowledge of that fact. [*453]

GIBBS, C. J. I do not think the knowledge of the name of the subscribing witness makes any difference in the case. I take the question to be, whether when one party calls for a deed of the other, who does not produce it, and the party calling for the deed is consequently driven to give parol evidence of its contents, it is necessary for him to call the subscribing witness. In cases where *non est factum* is not pleaded, as in ejectment, when a party so situated gives evidence of the contents of a deed, I never yet heard it contended that it was necessary to call the subscribing witness. Here, the deed was in the hands

† See *Phillips on Evidence*, vol. i. 463. 5th edit.; and the cases there cited.

‡ *Per Le Blanc, J.*, *Call v. Dunning*, 4 East, 54.

§ *Breten v. Cope, Peake, N. P. C.* 43. 3d edition.

¶ *Per Holt, C. J.*, *The King v. Culpepper, Skin*, 673.

of the defendant; if he wished to throw on the plaintiff the burthen of calling the subscribing witness, he might have produced the deed. It was alleged on the record, that the deed was in the defendant's hands, that allegation was admitted, and the defendant being called on to produce it, and refusing to do so, it was not necessary that the plaintiff should call the subscribing witness to the deed before he gave evidence of the contents.

PARK, J., of the same opinion.

BURROUGH, J. Not only was it averred on the record that the deed was in the defendant's hands, but that fact was proved, and also that notice had been given to him to produce it, which he refused to do; and I thought at the trial, as I think now, that there was no necessity for calling the subscribing witness.

Rule discharged.†

† Dallas, J., was absent, being ill.

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*MOORISH v. FOOTE.

[2 Moore 508. S. C.]

Case for negligently driving a mail coach against the plaintiff's waggon horse. whereby it died: Held, that the plaintiff's waggoner was incompetent to prove the negligence of the defendant without a release from his master.

CASE against the defendant, proprietor of a mail-coach, for negligence in driving the same against a waggon horse belonging to the plaintiff, whereby it died. Plea, general issue. At the trial before *Abbott, J.*, at the last *Exeter* assizes, the plaintiff called his servant the waggoner, who was examined in chief. The counsel for the defendant then objected to the reception of his testimony, on the ground of his interest in the event of the trial, founded on his liability to his master, and relied on the case of *Green v. The New River Company*, 4 T. R. 589. But, nothing having appeared to inculpate him at the time when the objection was made, *Abbott, J.*, repudiated the objection. The witness proved that he left sufficient room for the mail to pass, that he was driving the waggon on the proper side of the road; and that the death of the horse was owing to the negligence of the mail-coachman. This testimony was corroborated by a boy, also a servant to the plaintiff, and aiding in driving the waggon. *Abbott, J.*, summed up the evidence to the jury, and told them, if they thought the waggon was on the proper side of the road, or, if they thought that, having been on the wrong side, the waggoner was drawing off to the right side, and that the accident would have been avoided by the mail-coachman pulling up his horses, then they should find for the plaintiff: but if they thought that the waggoner was in fault, then they should find for the defendant. The jury found a verdict for the plaintiff; and as neither *the waggoner or his boy had been

*455] released, *Abbott, J.*, reserved the point made by the defendant, for the opinion of the court. Accordingly,

Vaughan, Serjt., (for *Pell, Serjt.*.) in the last term had obtained a rule *nisi* to set aside the verdict, and enter a nonsuit.

Lens, Serjt., showed cause. If there had been a charge of negligence from the first, either against the owner or the driver of the waggon, as a defendant, the objection might apply. But the witness here is called by the plaintiff

merely to show that the defendant's servant, negligently driving his carriage, ran against the plaintiff's carriage and killed his horse. Though the jury were ultimately called on to judge, whether the waggoner by being out of his proper place on the road occasioned the accident, the defendant must go much further, and show that the misconduct of the servant was such as to make him liable to his master. Nor does it follow, that because the plaintiff in the collision of two carriages, one of which is his own, cannot recover against the owner of the other, that he, therefore, has an action against his own servant. It is not sufficient to say that the witness was interested, because, if his master succeeded against the owner of the mail, no question could arise against the witness; it must be further shown, that the master was liable to the owner of the mail, which is negatived here. The evidence of servants is frequently received from the necessity of the thing;† the case of *Green v. The New River Company* is a mere exception to that rule. The verdict in that case might have been given in evidence in an action by the defendants against the witness, who was called by them. *That case, therefore, is totally inapplicable to the present question. [*456]

Pell, in support of the rule. The case of *Miller v. Falconer*, 1 Campb. 251, is in point for the plaintiff. Here, as in that case, the witness comes to discharge himself, and, therefore, ought to have been released. In *Cuthbert v. Gosling*, 3 Campb. 515, where the workmen were held competent witnesses for the master without a release, *Ellenborough*, C. J., said, the case was quite different from an action for the negligence of servants in driving against carriages or running down ships; for there, if the master be liable to the plaintiff, the servants are necessarily liable to the master; and they have a direct interest to defeat the action. In the present case, if the master recover against the defendant, he can have no action against his own servant, but, if he fail against the defendant, by reason that the accident happened by his servant's neglect, he may have an action against him. The servant, therefore, had an interest in swearing in his master's favor, and it is on the ground of such interest that a release is necessary in this and all similar cases, which must be decided on the general ground, not on what has appeared in evidence at the period when the objection is made.

Lens, Serjt., in reply, upon the cases cited, observed, that there must have been some circumstances in *Miller v. Falconer* other than those which appeared in the report; for it could hardly have been presumed that the plaintiff's first witness was in the wrong; a presumption on which the decision in that case is founded. As to the dictum of Lord *Ellenborough* in *Cuthbert v. Gosling*, the cases which he puts are cases of defendants, and there *is a strong distinction to be taken between a witness called to rebut a charge of negligence against his master, and a witness called to establish such a charge, made by his master against a stranger. [*457]

GIBBS, C. J. Are you aware of the case of *Protheroe v. Elton*?† I was rather surprised not to find that case mentioned in a book, for which the profession are greatly obliged to the author; I mean *Phillipps on Evidence*.§ *Protheroe v. Elton* was an action by the assured on a policy on goods on board a ship against the assurer. The defence was, that the ship was not sea-worthy. I was for the plaintiffs, and we called the ship-owner to prove that she was sea-worthy. But Lord *Kenyon* held, that the witness was inadmissible, because, if he proved that the ship was sea-worthy, he relieved himself from an action by the plaintiffs, for furnishing them with an incompetent ship, to which he would have been otherwise liable. If the plaintiffs had recovered a verdict against the underwriter, on the testimony of the witness, that the ship was staunch, they would for ever have been silenced as to any action against the

† See *Buller's Nisi Prius*, 289.

‡ Reported in *Peake, N. P. C.* 117, 3d edition, under the title of *Rotheroe v. Elton*.

§ This case is cited in the 5th ed. of Mr. *Phillipps'* book, vol. i. 57, *Peake's N. P. C.*

ship-owner for loss arising from his providing them with a ship not sea-worthy. The principle is this; witnesses are incompetent where they are directly interested in the event of the suit. It is perfectly clear, that the witness, in the present case, was interested in the event of the suit: for, if the verdict were to stand, he would be placed in a state of security. I think, in point of law my brother *Abbott* was right in repudiating the objection, considering in what stage of the case it was made, and in putting the case to the jury. But, considering *458] the very liberal *way in which business is carried on between the bar and the bench, it is not to be assumed, because counsel may reserve an objection, thinking that an opportunity will occur in a later stage of the cause for taking it, that, therefore, the objection is waived, I am of opinion that the rule must be made absolute.

PARK, J., of the same opinion.

BURROUGH, J. I am of the same opinion. A distinction has been taken between witnesses for a plaintiff and witnesses for a defendant; but it would introduce an extreme anomaly in the law if it made any difference in cases of this nature, whether a witness was called on one side or on the other.

Rule absolute.†

† *Dallas, J.*, was absent; but he was present when the rule nisi was granted, and also when the case was much discussed on both sides, on a former day in this term. Every thing that fell from the learned Judge showed the inclination of his opinion to be that the witness was incompetent, being called to inculcate another and exculpate himself.

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*AISLABIE v. RICE.

[2 Moore 358. S. C.]

Real estate was devised to *H. L.* and her assigns for life, in case she should continue unmarried, and after her decease unto such persons as she should appoint, and in default of appointment, then over to other persons; and the testator declared that, in case *H. L.* should marry in the lifetime of his wife with her consent, or after the death of his wife, with the consent of two persons mentioned in his will, or the survivor of them, *H. L.* and her assigns should hold the same real estate in such manner as she should have done if she had continued unmarried. After the death as well of the testator's wife, as also of the two persons so mentioned in his will, and above twenty years since, *H. L.* married *R. A.*, who also died in the lifetime of *H. L.*: Held, that the estate for life in *H. L.* was become absolute, and that she could then execute the power of appointment.

THE following case was sent by his honor the master of the rolls for the opinion of this court.

Michael Hatton, theretofore of *Dane Court* in the county of *Kent*, duly made and published his last will and testament in writing, dated the 14th of *February*, 1771, and executed in such manner as by law is required for the passing of real estates. By such will the testator, (amongst other things,) after giving a life-interest to *Alice Hatton*, his wife, in all and singular his real estates, made a devise in the words following, "And as concerning my manor or lordship of *Dane Court*, with the manor and manor-house called *Dane Court*, and the several houses, lands, and appurtenances thereunto belonging: and also my plate, china, and furniture, goods, horses, cattle, carriages, and husbandry tackle, which shall be in my said house and appurtenances at the time of my decease, I give, devise, and bequeath the same and every part thereof unto *Hannah Lilly* and her assigns, for and during the term of her natural life, in case she shall continue single and unmarried: And from and after her decease, I give, devise, and bequeath the same manor or lordship of *Dane Court*, with the manor and manor-house called *Dane Court*, and the

several houses, lands, and appurtenances thereto belonging; and also all the said plate, china, furniture, goods, horses, cattle, carriages, and husbandry tackle, *unto such person or persons, and in such shares and proportions, and in such manner and form as the said *Hannah Lilly* shall by [*460 any deed or deeds, writing or writings, or by her last will in writing, signed and executed in the presence of three or more credible witnesses, direct, limit, or appoint; and, for want of such direction, limitation or appointment, then I give, devise, and bequeath the same and every part thereof, unto *Alice Lilly* and *Mary Lilly*, and their heirs, executors, administrators, and assigns, to be equally divided among them, share and share alike, as tenants in common and not as joint tenants; but, in case the said *Hannah Lilly* shall marry in the lifetime of my said wife, and with her consent and approbation, or after the death of my said wife, with the consent and approbation of *James Tierney* of *London*, merchant, and *Thomas Lilly* of *London*, merchant, or the survivor of them, (such consent and approbation to be signified in writing, under her, his, or their hand or hands;) then and in either of the said cases as the event shall be, it is my will and mind, and I do hereby order and direct that the said *Hannah Lilly* and her assigns shall have and enjoy the said manor of *Dane Court*, with the houses, lands, and appurtenances thereunto belonging; and also the said plate, china, and other effects, in the same manner as she would have done if she had continued single and unmarried."

The testator died in the year 1776, without having altered or revoked his will, leaving *Alice Hatton*, his wife, therein named, and the above mentioned *Hannah Lilly*, then unmarried, him surviving. *Alice Hatton* enjoyed the possession of the said hereditaments and premises, (among other things,) for her life; and having survived the testator about fifteen years, died in the month of *December*, 1791, leaving *Hannah *Lilly*, her surviving unmarried. [*461 After the death of *Alice Hatton*, *Hannah Lilly* entered into the possession and enjoyment of all and singular the said estates, hereditaments, and premises at *Dane Court*, with the appurtenances as such devisee under the said will.

James Tierney and *Thomas Lilly*, mentioned as above in the testator's will, died many years ago, and whilst *Hannah Lilly* still continued unmarried. *Hannah Lilly* having so remained unmarried until after the respective deaths of the testator's widow, *James Tierney*, and *Thomas Lilly*, intermarried with *Rawson Aislabie* above twenty years ago, and her said husband died in the year 1806.

Hannah Aislabie (late *Hannah Lilly*) had always, from the death of *Alice Hatton*, been in the uninterrupted possession and enjoyment of the said hereditaments and premises, or in the peaceable and uninterrupted receipt of the rents and profits thereof; but having contracted with *Edward Royd Rice* to sell and make out a good title to him of the inheritance thereof in fee simple, and *Edward Royd Rice* objecting to her title under the said will, upon the circumstances above stated, a suit was instituted in his majesty's High Court of Chancery, by *Hannah Aislabie* against *Edward Royd Rice*, for the purpose of enforcing the fulfilment of the contract.

The question for the opinion of the court was, what estate, right, and interest, in the real estates at *Dane Court*, *Hannah Lilly* (afterwards, and then *Hannah Aislabie*) took under the said will, and what estate, right, and interest, she then had therein under the circumstances above stated.

The case was argued in *Easter* term, 1817, by *Copley*, Serjt., for the plaintiff, and *Pell*, Serjt., for the defendant; and afterwards in the last term, by *Faughan*, Serjt., for the plaintiff, and *Best*, Serjt., for the defendant.

*Arguments for the plaintiff. *Hannah Aislabie* took an estate for [*462 life determinable on her marriage in the lifetime of her mother without her consent, or, after the death of her mother, without the consent of the trustees mentioned in the will; and this consent having become impossible by

the act of God, she now takes an absolute estate. The clause requiring such consent to her marriage, must be considered a condition subsequent, and not a condition precedent; the distinction between these conditions is, that a condition precedent must be performed before the estate vests; in the case of a condition subsequent, the estate vests immediately, subject to be divested by some subsequent act or event. No technical words are necessary to constitute a condition subsequent; whether a condition be considered precedent or subsequent depends on the intention of the party creating it. Where it appears that the party is intended to take until the condition be performed, it must be considered a condition subsequent; thus, in the case of a limitation to the use of *A.* in fee, if *R.* do not pay 10s. to *A.* before a certain day, and if he do pay then to other uses, the condition is subsequent, and *A.* is to take until payment, 1 *Roll. Abr.* 415, pl. 12; and in *Edwards v. Hammond*, 3 *Lev.* 132, under a devise to *A.* and his heirs, if he lived to twenty-one, but if he died before twenty-one, to another, the condition was subsequent, and *A.* took a vested estate immediately, subject to be divested if he died before twenty-one. So in this case, *Hannah Aislable* took a vested estate, subject to be divested on her marriage without the consent required by the testator, in the lifetime of her mother or of the trustees. In the case of a feoffment with a condition subsequent, which is impossible, the estate of the feoffee is absolute; but, if a condition precedent be impossible, no

*463] "estate or interest shall grow thereupon, *Co. Litt.* 206, b. Here, the condition subsequent became impossible by the act of God, and *Hannah Lilly*, therefore, took an absolute estate on the death of the survivor of the parties required to consent to her marriage. In *Thomas v. Howel*, 4 *Mod.* 67, one devised to his daughter, upon condition of her marrying his nephew before she attained twenty-one; after the death of the nephew, the daughter, before she attained twenty-one, married *J. S.*, and it was adjudged that the condition was not broken, having become impossible by the act of God; the cases of *Harvey v. Aston*, 1 *Atk.* 361, *Bertie v. Falkland*, 1 *Salk.* 231, *Graydon v. Hicks*, and *Graydon v. Graydon*, 2 *Atk.* 16, are also authorities in support of the plaintiff. *Peyton v. Bury*, 2 *P. Wms.* 626, is precisely similar to this case. There the testator devised to *J. S.*, provided she married with the consent of his two executors, and it was held, that, on the death of one, she might marry without the consent of the survivor, the condition (which was also held to be subsequent,) having become impossible. The decision in *Mercer v. Hall*, 4 *Bro. Ch. Ca.* 326, is to the same effect.

But in the next place, as to the power of appointment. Even supposing the marriage of *Hannah Aislable* to have been a breach of the condition, the power of appointment would not have been affected. The condition was by the devise, annexed to the life estate only, and did not extend to her power of appointment; neither would the power have been affected by a forfeiture of the life estate, for it is a power collateral or in gross. It is independent of the life estate given, it does not operate upon that estate, nor would the interest of an appointee arise out of that estate. Being, therefore, a power collateral or in

*464] gross, it is not affected by any alteration of the life estate. The donee of a power to charge lands, being tenant for a term of years, and surviving the term, may exercise his power, and so also, if he has assigned the term. *per* the Lord Chancellor in *Savile v. Blacket*, 1 *P. Wms.* 777. In *Edwards v. Slater*, *Hardres*, 410, it was held that a tenant for life, with a power of jointuring, who forfeited his life estate, might afterwards well exercise the power; *Life v. Saltingstone*, 1 *Mod.* 189, is also applicable to this case. Supposing, therefore, a breach of this condition to have been committed, it would have affected the life estate only of *Hannah Aislable*; and the subsequent limitations, which would otherwise take effect by way of executory devise, may now be defeated by the power of appointment, *Doe v. Martin*, 4 *T. R.* 39. Then as to the life estate, which is the only particle of interest to be affected by a forfeiture, the heir at law has not now any remedy. *Hannah Aislable*

has been in possession for more than twenty years since her marriage, and the entry of the heir is, therefore, barred, *Stokes v. Berry*, Salk. 421. And he cannot maintain a writ of right, for that lies only by tenant in fee,[†] and not by tenant for life.[‡] The heir alone could have entered for the forfeiture, *Warren v. Lee*, Dyer, 126, b; and many cases to that effect are collected in *Bac. Abr.* §

Hannah Aislalie, therefore, can now make a good title: First, there has been no forfeiture, and her estate has become absolute; and, secondly, if there had been a forfeiture, the power of appointment would not have been affected, and as to the life estate, the only person who could have taken advantage of the forfeiture, would be now barred of all remedy.

*Arguments for the defendant. *Hannah Aislalie* having married [465 without the consent of the persons whose consent was made requisite by the testator, her life estate is forfeited, and her power of appointment is destroyed. It has been assumed that this must be considered a condition subsequent, and also that the ulterior devises are to be construed to take effect by way of executory devise; but the intention of the testator must be the guide, and this construction cannot be supported if it appear to be repugnant to the testator's intention. His intention was, that if *Hannah Aislalie* married without the consent of the persons named in his will for that purpose, she should take no estate whatever; and that the estate of the devisees in remainder should vest in possession immediately upon her marriage without such consent. The devise is not to her for life merely; the testator adds, "but in case she shall marry, &c.," which words create a limitation over and not a condition, and, upon her marriage, the devisees in remainder might have entered, see *Bac. Abr.* ¶ It is not to be denied that this power, if considered merely as a power collateral, might subsist after the determination of the life estate, but the testator has expressly indicated his intention, that, on the happening of a certain event, such power should cease. That event has happened, and, if such intention is to be effectuated, the power is gone. It cannot be supposed, that the testator intended that the smaller estate should be forfeited, and that the power over the larger estate should remain unaffected. Therefore, on the forfeiture of the life estate, the vested remainder in the ulterior devisees came into possession absolutely, and they have now the whole fee, which puts an end to the question respecting the bar by length of time. But *supposing the words of the will to create a condition, they cannot be considered to create a condition subsequent; and if they constitute a condition precedent, the estate and power are gone, for, although rendered impossible by the act of God, the power cannot, be exercised, nor can the estate take effect. *Co. Litt.* 206, b. Here *Hannah Aislalie* to have acquired an absolute estate, and an unconditional power of appointment, must have married in the lifetime of the persons whose consent was required. No principle can be extracted from any of the cases cited which is applicable to this case. *Peyton v. Berry* is wholly irreconcilable with *Harvey v. Aston*, and the decisions in equity regarding personal property cannot govern this case. The power of appointment is clearly destroyed, for notwithstanding any grounds which may be urged for construing this a condition subsequent attached to the life estate, the condition attached to the power is precedent. To give effect to this will, it must be construed according to the testator's intention, and by that intention the estate and power of *Hannah Aislalie* are gone. [466

Cur. adv. vult.

The following certificate was sent to the Master of the Rolls.

"We have heard this case argued, and have considered it. We are of

[†] *Com. Dig. Droit.* (B. 1.)

[‡] *Com. Dig. Droit.* (B. 2.)

§ *Tit. Remainder and Reversion*, 805, et seq., 5th edit.

¶ *Tit. Remainder and Reversion*, 801, et seq., 5th edit.

opinion that *Hannah Lilly*, now *Hannah Aislavie*, took under the above will an estate for life, with a power of appointment unto such person or persons, and in such shares and proportions, and in such manner and form, as she should, by any deed or deeds, writing or writings, or by her last will in writing, signed and executed in the presence of three or more credible witnesses, direct, limit, *467] and appoint, subject *nevertheless as to her life estate only, to the condition of her remaining sole and unmarried; which condition was qualified by the proviso, that a marriage with the consent and approbation of *Alice Hutton*, the wife of the deviser, in her lifetime, or after her death, of *James Tierney* and *Thomas Lilly*, signified in the manner expressed in the said will, should not determine her life estate: we are of opinion, that this condition was a condition subsequent, and that as the compliance with it was, by the deaths of *Alice Hutton*, *James Tierney*, and *Thomas Lilly*, before the marriage of *Hannah Lilly*, become impossible by the act of God, her estate for life is become absolute, and that she may now execute the power of appointment of the real estates at *Dane Court*, in the manner and form directed by the above will.

V. GIBBS.
R. DALLAS.
J. A. PARK.
J. BURROUGH

*468] *(IN THE EXCHEQUER CHAMBER.)

(In Error,)

DRIVER on Demise of FRANK FRANK, Esq. v. The Rev. EDWARD FRANK.

[2 Moore 519. S. C.]

Devise to *B. F.* for life remainder to the second, third, fourth, and other sons of *B. F.*, except the first or eldest son, in tail male successively; remainder to *F. S. B. F.* had no issue at the time of the decease of the testatrix, but afterwards had four sons, of whom the second and third were living at the same time; and the second and fourth were also living at the same time; but at the decease of *B. F.*, the fourth son only was living: Held, that the remainder to the second and other sons of *B. F.*, except the first or eldest son was vested, upon *B. F.* having two sons living at the same time, and was not subject to be divested by subsequent events, and consequently that the fourth and only surviving son of *B. F.* took an estate tail under the devise. By four judges against two, *Graham B.* and *Wood B.* dissentient.

EJECTMENT. At the *Summer assizes* for the county of *York*, 1812, a verdict was found subject to the opinion of the Court of King's Bench on a case which was afterwards, by permission, turned into a special verdict, of which the following is the substance.

Margaret Frank, widow, being seised in fee of the premises in question, by her will, dated the 12th of *November*, 1765, duly executed and attested, (after appointing and devising her capital messuage or dwelling-house, with the appurtenances, situate in *Pontefract*, to the use of her sister, *Dame Catherine Standish*, for life, upon a condition therein mentioned; with remainder to the use of the testatrix's niece, *Catherine* the wife of *Bacon Frank* of *Campshall*

in the county of *York*, Esquire, for life: and, after devising certain meadow, pasture, and arable grounds to trustees for the term of ninety-nine years, to be computed from the time of her decease, if her niece should so long live. Upon trust to pay and dispose of the clear rents and profits thereof, to such person or persons as her said niece should direct and appoint, by way of pocket money for her during her husband's life, and in augmentation of her jointure after his decease, in case she should survive him,) devised her said capital messuage or dwelling-house, and the *grounds above mentioned, from and immediately after the termination of the several estates and interests thereinbefore [*469 limited; and also, all and singular her manors, parts and shares of manors, messuages, lands, tenements, hereditaments, and real estate whatsoever, as well freehold as copyhold, from and immediately after the said testatrix's decease, (except as therein was excepted) to the use of *Bacon Frank* for life without impeachment of waste; with remainder to the use of the said trustees and their heirs, during the life of the said *Bacon Frank*, in trust to preserve contingent remainders; and then devised in the following words: "And from and immediately after the decease of the said *Bacon Frank*, then to, and to the use of the said *Bacon Frank*, begotten or to be begotten on the body of my said niece *Catherine*, his now wife, *except the first or eldest son*, severally successively, and in remainder one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of every such son and sons (except the said first or eldest son) lawfully issuing, the elder of such sons and the heirs male of his body being always preferred, and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing;" and in default of such issue, the testatrix then devised all and every her said manors, messuages, lands, &c. as well freehold as copyhold, (except as before excepted,) unto and to the use of her godson, *Frank Sotheron*, (the lessor of the plaintiff,) the youngest son of *William Sotheron* of *Darrington*, in the county of *York*, Esquire, by her neice *Sarah*, his then wife, for life without impeachment of waste; with remainder to the use of the said trustees and their heirs during the life of *Frank Sotheron*, in trust to preserve contingent remainders; and from and immediately after *the decease of the said *Frank Sotheron*, then [*470 to, and to the use of the first, second, third, fourth, and all and every other the son and sons of the body of the said *Frank Sotheron* lawfully begotten in tail male, severally, successively, and in remainder one after another according to their seniority, with divers remainders over, the ultimate remainder being to the use of her nephew and three nieces, *Sir Frank Standish*, Bart., *Sarah*, the wife of the said *William Sotheron*, *Elizabeth*, the wife of *Robert Ramsden*, and *Catherine*, the wife of the said *Bacon Frank*, and their respective heirs and assigns for ever, as tenants in common.

There was a proviso in the will, that the tenant in possession for the time being, of the estates, should assume and use the surname of *Frank* only, which had been accordingly done by *Frank Sotheron* in the said will named, now *Frank Frank*, the lessor of the plaintiff.

The testatrix died on the 1st of *June*, 1766, without revoking or altering her will. *Dame Catherine Standish* died many years ago. *Bacon Frank*, the tenant for life, had issue by his said wife, four sons, that is to say,

Richard, who was born on the 22d of *August*, 1768, and died on the 26th of *February*, 1769.

Bacon, who was born on the 2d of *August*, 1770, and died without issue on the 16th of *June*, 1789.

Edward Richard, who was born on the 5th of *June*, 1777, and died on the 22d of *October*, 1777. And,

Edward Frank, (the defendant,) who was born on the 6th of *March*, 1780 and is now living

Bacon Frank, the tenant for life, died in 1812, leaving the defendant, his then only son, him surviving. *Catherine*, the wife of *Bacon Frank*, died in his life time.

At the time of making the said will, *Bacon Frank*, (the father of *B. Frank*.) the first taker of the devised estates, was in possession as tenant in tail of large *471] freehold estates at *Campsall* and other places in the county of *York*, of considerable annual value, and tenant in fee of other estates: and *William Sotherton*, the father of the lessor of the plaintiff, was in possession as tenant in fee of part, and as tenant for life, with remainder to his eldest son in tail of other part, of estates of considerable annual value.

The Court of King's Bench, after hearing two arguments, gave judgment on the 17th of *June*, 1814,† for the defendant. A writ of error was afterwards brought in this court, and the case was twice argued. First, in *Trinity* term, 1815, the 2d of *June*, by *Richardson* for the lessor of the plaintiff, and *Holroyd* for the defendant; and again in *Easter* term, 1818, 28th *April*, by *Scarlett* for the lessor of the plaintiff, and the *Solicitor-General* for the defendant.

Arguments for the plaintiff. Whether the estates devised by the will of *Margaret Frank* be now the property of the plaintiff or of the defendant, depends on two questions. First, whether the limitation to the second, third, fourth, and other sons of *Bacon Frank*, gave a vested interest to the person answering such description immediately on his birth; or, on the contrary, created a contingent remainder to such son as should answer the description at the decease of *Bacon Frank*. Secondly, whether, if considered a vested estate in remainder in a younger son, such estate was not divested, upon such younger son becoming an elder son, during the life of *Bacon Frank*. The plaintiff must recover if the limitation be considered a contingent remainder, or if being a vested remainder, it has been subsequently divested.

It is clear, that the testatrix intended to make a provision for the younger *472] male branches of the *Frank* family in exclusion of the elder branch; and in the event of the failure of the younger branches, to prefer the plaintiff, her godson and nephew, to the elder branch of the *Frank* family. She could not have had any personal affection for the younger branches of this family, as at the time of her decease, *Bacon Frank* had no child; she must, therefore, have been influenced by other motives than a preference of the younger part of the family to the elder. The testatrix wished to exclude the eldest son, on the ground of his being otherwise provided for, her clear intention being to found a new family. In *Fox dem. Lowndes v. Lowndes*, 4 Burr. 2246, the judgment of the court was given on the ground of such intention being apparent on the will.

At the time of the decease of *Bacon Frank*, the defendant was the eldest son, and if this be considered a contingent remainder, all difficulty ceases. The words, "first or eldest son," are not to be construed to mean the first born son, but the first or eldest son in being. In *Fitzherbert's Natura Brevium*, 32, on the writ *de auxilio ad filium suum militem faciendum vel ad filiam maritandam*, it is observed, that, if the eldest son die under age, the lord shall have aid for the younger son, for the words of the writ *primogenitus filius* designate such son as shall be the *primogenitus* and heir apparent at the time. And *Coke*, 2 Inst. 231, observes on the statute of *Westminster*, 1 c. 36., that the words, *eigne fils*, are construed in the same manner.

In the construction of wills, the same rule prevails, *Lomax v. Holmden*, 1 Ves. 290. And in *Chadwick v. Doleman*, 2 Vern. 528, which was the case of an appointment under a marriage settlement, the same rule was applied. Lord *Teynham v. Webb*, 2 Ves. 198, is also an authority to the same effect. In *Beale v. Beale*, 1 P. Wms. 244, it is laid down, that the words "younger *473] children," comprise all the children but the heir; and, in *Chadwick v. Doleman*, the Lord Keeper held the appointment to create a tacit con-

† By three judges against one, *Ellenborough*, C. J., dissentiente. See 3 M. & S. 25.

dition, that the quality of younger son should continue until the time of payment. So in this case, the intention being to make a provision for the younger male branches of the family, the continuance of youngerhood is a tacit condition annexed to the gift.

But, supposing this remainder to have vested, it was divested on the defendant's becoming the eldest son. A remainder may vest, and afterwards divest on a subsequent event, not only in equity, but at law, *Doe v. Martin*, 4 T. R. 39, and *Fearne on contingent remainders*, (244., 7th ed.) and the cases there cited. If, therefore, this remainder did vest in the second son living, on his becoming an eldest son, it divested and shifted to the next brother in succession. By considering this limitation a contingent remainder, or if vested, to have been divested on each son's becoming the eldest son, the intention of the testatrix will be effected. That the carrying into effect of the intention of the testator, when not inconsistent with strict rules of law, is the proper guide for the decision of the court, is apparent from the decisions in *Doe dem. Long v. Laming*, 2 Burr. 1100, and *Goodtitle dem. Sweet v. Herring*, 1 East, 264.

Arguments for the defendant. Under the limitations of this will, the defendant took a vested interest in remainder, upon his birth, he having an elder brother then living. He has been expressly designated by the words of the will as an object of the bounty of the testatrix, and there are no grounds for inferring that her intention was to exclude him. Though the fact of *Bacon Frank's* having large estates entailed on his eldest son is stated in the special verdict, it does not appear that *that fact was known to the testatrix. [*474 Besides, it is a clear rule, that the court cannot, in construing a will, regard events happening after the death of the testator, [*Willes, C. J.*, in *Doe dem. Morris v. Underdown*, *Willes*, 293.] but it must look to the state of facts at the time of making the will. It is a settled rule of law that courts will never construe remainders to be contingent, if they can construe them to be vested. This is clearly a vested remainder, and does not differ from the common limitation to first and other sons, except in the omission of the first son. The defendant answers the description of the will; he had an elder brother living at his birth, at which time, consequently, the remainder vested. Many cases decided in equity have been cited relative to the vesting of portions, and to show the necessity of the party continuing to be a younger child; but in *Hentage v. Hunloke*, 2 Atk. 456, Lord *Hardwicke* expressly says, "I do not remember that this construction has been made upon a legal limitation." Those cases are not applicable to this case; but for the defendant, *Trafford v. Ashton*, 2 Vern. 660, is a very strong case. There the testator devised to his daughter for life, with remainder to her second son in tail male, and so to every younger son, with remainders over. There were two sons of the daughter, and the eldest dying, the survivor, though an only son, was held to be entitled. *Lomax v. Holmden*, upon which much stress has been laid, was a case in favor of the parties' taking an estate, but has been cited in support of defeating an estate. As to the writ in *Fitzherbert's Natura Brevium*, that point is stated by *Fitzherbert* to have been settled, on the ground that the party ought to be heir apparent. In *Doe dem. Lowndes v. Lowndes* there were express words upon which the court decided, and no such words are here.

*The words of this will are clear and plain to make it a vested remainder, and there are no words to divest it. There are undoubtedly [*475 cases in which a remainder may be divested, as in *Doe v. Martin*; but in no case similar to the present has it been so held. No case can be produced of an estate divesting, unless there be express words to divest it, which here there are not. *Bacon's Abridgment*.† The cases referred to in *Fearne on Contingent Remainders* do not touch this question. By the words and fair construction of this will, the defendant is entitled, and the plaintiff cannot recover against

† Title, *Done et Remainder*, pl. 21.

him. He has failed in showing it to have been the intention of the testatrix, that, if the eldest son died when the second son had become entitled to the devised estates, the second son should lose them on the decease of his elder brother; and if such intent could be collected, it could not be shown that it could here take effect according to the rules of law, for this is a vested and not a contingent remainder, and there is no provision in the will for divesting it when once vested. Looking at the will alone and not at subsequent events, which the court cannot look at, this remainder clearly vested in the defendant on his birth, not subject to be divested upon the happening of any subsequent event.

And now, there being a difference of opinion in this court also, the judges who were present and had heard the arguments, gave their opinion *seriatim*.†

GARROW, B., declined giving any opinion, not having heard the first argument.

BURROUGH, J. This case comes before the court on a writ of error from the *476] Court of King's Bench. (Here *the learned judge stated the special verdict until he came to the limitation in remainder in tail male to the sons of *Frank Sotheron*.) I need not read any more of this will, in which there is a proviso that the tenant in possession, for the time being, of the estates devised, should assume and use the surname of *Frank* only, which has accordingly been done. (The learned judge then read the remainder of the special verdict.) Under these circumstances, the question presented to us for our decision is, whether the judgment of the Court of King's Bench in this case is erroneous. The question argued before us was, whether the remainder limited to the use of the second, third, fourth, and all and every other the son and sons of the body of *Bacon Frank* begotten, or to be begotten on *Catherine* his then wife, *except the first or eldest son*, vested in the defendant, *Mr. Edward Frank*, as soon as he stood in the relation of second son. And, if it vested, I confess I see no reason for saying it has been divested. Whether it so vested or not, must depend upon, and is to be collected from the words of the will, and from the whole frame of that will. I am very much governed in my opinion, from the technical description in the clauses of the will throughout, and particularly in those parts of the will which I have carefully stated; and I have stated that part of the will, because I think it contains on the face of it one of the strongest arguments in favor of the defendant; and I think that the plaintiff cannot be successful, without calling in matter not in the will, or inferring circumstances from what is stated in the will. I cannot do better than use the words of one of the learned judges of the Court of King's Bench‡ "and though I agree the preventing an union of the estates was the most probable, yet there does not *477] appear to me to be *that certainty in this case upon which alone a court of justice ought to act."

I think there is nothing in this will that can be construed in favor of the lessor of the plaintiff, while there is a younger son of *Mr. Bacon Frank*: for *Mr. Sotheron* becomes the object of her bounty only on the failure of male issue of the younger branches of the family of *Mr. Bacon Frank*. The defendant was a younger son of that family, and the words of the will are "and, in default of such issue, then I do appoint, limit, give, and devise all and every my said manors, &c., &c., unto and to the use and behoof of my godson, *Frank Sotheron*," from which it is clear, that she did not intend *Mr. Sotheron* to take in exclusion of the defendant and his issue.

On the part of the lessor of the plaintiff, the argument was, that it was the intention of the testator that the limitation should remain contingent until the death of the tenant for life; until the death of *Mr. Bacon Frank* the father. That must be collected from the clause of the will, which I have already stated: "and from and immediately after the decease of the said *Bacon Frank*, then to,

† Absent, *Park, J.*, who had been of counsel in the cause, *Graham, B.*, and *Dallas, J.*

‡ *Bayley, J.*, 3 M. & S. 41.

and to the use of the second, third, fourth, and all and every other the son and sons of the body of the said *Bacon Frank*, begotten or to be begotten on the body of my said niece, *Catherine*, his now wife, *except the first or eldest son*." Here, I cannot help adverting to what was said by another of the learned judges of the Court of King's Bench, in delivering his opinion on this case. "It has been attempted to assist this supposed intention by a distinction between the words, *first and eldest*, as not being synonymous. I must confess, I did not very much feel the force of this argument, and I am not sure that I understand all the bearings of it: my opinion is, however, that it fails in its foundation, and that *first or eldest* mean the same person, *eldest* being *only another description of the *first*." I fully agree with that learned judge in [*478 opinion, that the will is to be so understood.

On this point it has been contended, that this exception overrides the whole clause; and that the intention is, that the remainder should not vest till the death of the father, *Bacon Frank*; and that, on that event, the estate should be then given to the person who answers the description of second son: but, on the other hand, I think it has been irresistibly shown, that the limitation to the second son is left untouched. The exception was meant to apply to all and every other the son and sons of the body of *Bacon Frank*, begotten or to be begotten on the body of his wife *Catherine*. It is not consistent with the accuracy of the general language of the will, to refer this exception to the second, third, fourth son, &c., but it is consistent with that language to refer it to all and every other the son and sons of the body of the said *Bacon Frank*. I admit that it shows abundant caution to exclude the first or eldest son, but it leaves the limitation to the second son untouched. The will is so accurately framed throughout, that, if the person who drew it meant to prevent such a legal operation of the will, and to prevent the limitation from taking effect until the death of the father, it would not have been left to supposition or conjecture, but a special provision for that purpose would have been introduced into the instrument. There is no such provision, and, on the whole, I am of opinion that the judgment of the Court of King's Bench ought to be affirmed. First, because the testatrix's intention is not sufficiently clear to warrant us in saying, that the limitation cannot have effect until the death of the tenant for life, and there are no express words to warrant that which is contended for by the plaintiff in error on this subject; and, in the second place, because it is the object of the cases which have been decided on this subject, to vest the interest as soon as the *words of the instrument will fairly admit it. I rest on [*479 the words of the instrument to show, that that is the effect; and the ordinary effect should be given to the words, unless there appears a plain and manifest intent to the contrary.

It has been argued, that these words "from and immediately after the decease of the said *Bacon Frank*, then to and to the use of the second, third, fourth, and all and every other the son and sons of the body of the said *Bacon Frank*, &c.," would not vest the remainder in the second son until the death of *Bacon Frank*. If this limitation had been "to the first, second, third," &c., it would not have prevented the vesting of the remainder until the death of the father, but it would have vested in the first son the moment he was born; and, in my judgment, there is nothing in this will, nor in the special verdict, to prevent the remainder limited to the second son vesting, as soon as he answered that description, which he did at the moment of his birth, on the 6th of *March*, 1780, having an elder brother *Bacon*, then living, and who continued to live for nine years afterwards. That circumstance I have not overlooked: I do not feel it necessary to go farther into the circumstances of the case. Upon the whole, I think the judgment of the Court of King's Bench is perfectly correct.

Wood, B. On the best consideration which I have been able to give to this

case, I am sorry I cannot agree in opinion with what has just been delivered before me. What I shall have to say on this subject will be extremely short. It may be sufficient to say, I agree in opinion with the Lord Chief Justice of the Court of King's Bench, which opinion is very fully reported in the third volume of *Maule & Selwyn*. All the cases which I think applicable to the subject have been fully discussed; and I found my opinion entirely on what I conceive to be *the clear intention of the testatrix, as evidently appearing or fairly to be inferred from the words of the will. I agree, we are not to construe a will merely from conjecture: but, if we can collect an intention from what is stated in the will, and that intention is not contrary to the rules of law, the law will carry it into effect.

My learned brother has already fully stated the special verdict; and, therefore, it is not necessary for me to go through it, except that I shall take the liberty to state the first clause, limiting the estate to *Bacon Frank* during the term of his natural life, then to trustees, to preserve contingent remainders; and, "from and immediately after the decease of the said *Bacon Frank*, then to and to the use of the second, third, fourth, and all and every other the son and sons of the body of the said *Bacon Frank*, begotten or to be begotten on the body of my said niece *Catherine*, his now wife, *except the first or eldest son*, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of every such son and sons, except of the said first or eldest son;" and, in default of such issue, then over to the present plaintiff, *Frank Sotheron*, who has taken the name of *Frank*, and to whom the testatrix has devised by name. The whole of this case turns on the effect and application of that exception. The probability, and, indeed, I think, the obvious meaning of this clause is, that the testatrix meant to exclude the first son, and, as I conceive, any of the other parties who could have succeeded to the father's estate. I think that is perfectly clear. Whoever, therefore, became the eldest son, would, in all probability, succeed to his father's estate, and, therefore, she meant to exclude that person, and her intention was, that her property should go to the younger branches of that family. If there was no younger branch of the family of *Bacon Frank*, *then she gives it over. At the death of *Bacon Frank* there was one son only living; and, therefore, that event has happened, which entitles the lessor of the plaintiff to this estate.

Now what did the testatrix mean to exclude, under the denomination of the *first or eldest son*? the whole turns upon that. *First or eldest son*, I believe, are not synonymous. The *first son* means the first born; *eldest*, I conceive, may be applied to the second, third, fourth, or any other son or sons who should become an eldest son. It would be idle, if there is no distinction between *first or eldest* to introduce the expression into the will, for the purpose of giving it no meaning whatever. The words of the will, as well as this part of it, certainly imply, that a meaning is to be ascribed to them. Why should the maker of this will have made an alteration in the limitation, unless he meant something by the words OR ELDEST? What, then, does the expression mean? It means, in my mind, the first born son, or any other son becoming, and being the eldest son at the death of the father. That I conceive to be the meaning fairly to be implied from the words *first or eldest*. Who should be the eldest son remains in a state of uncertainty and contingency until the death of the father; and, therefore, it appears to me, that the testatrix never meant that any estate should vest until the father's death. That she could not have meant that the estate should vest until the death of the father, seems to me to be clear, on account of this very uncertainty. Without the words *first or eldest*, it would have been a vested estate; but the words *first or eldest* are tantamount to saying that it shall continue contingent until the death of the tenant for life; and whoever is eldest at that time shall be excluded from this estate; the consequence

of which is, that the lessor of the plaintiff becomes entitled to it. The word *eldest* is a term not immediately designating any particular person; but *shifting in its application according to the changes which may take place in a family. The object of the testatrix appears to me to have been to exclude from the succession to her estate any of the sons of *Bacon Frank* who should take his estate; and she has named the *eldest* as being the son who would in all probability take his estate. That, I repeat, appears to me to be the sense and meaning of that exception. [*482]

That construction, it is contended, would be attended with inconveniences, because, if the limitation to the second son is to be contingent until the death of the father, the second son might die in the lifetime of his father, and might leave issue who would be entirely unprotected; as the estate would then go over to the third son, if there was a third son, or if not, it would go over to Mr. *Sotherton*: and that it is with the view of effectuating the supposed intention in the testatrix, that it must be considered to be an absolutely vested estate, when a son was born, who answered the description of second son in the father's lifetime. How that might be, I cannot pretend now to determine. However, supposing it to be so, I should still consider, that if the drawer of the will had called her attention to such an event as that, she would in all probability, have directed him to provide for it. That has not been done in this case. Her attention, in my opinion, has only been directed to the case which has happened, namely, to the case of there being only one son of *Bacon Frank* living at the time of his death; and that is the case for which she has provided. In my apprehension, she has provided for it: and I am for making a provision for a case which *has* happened, and I am not for providing for a case which has *not* happened. It is said, that there are abundant instances of estates vesting, and afterwards divesting: I apprehend that there is nothing contrary to the rules of law, in supposing this estate to have become vested when a *person came in *esse* who answered the description in the will, and afterwards to have been divested on that person becoming the eldest son: the time of the estate falling into possession, is the time when the intention of the testatrix is to be carried into effect; and the carrying into effect of that intention, is the only criterion by which the will is to be construed; and, therefore, *quacunqve via data*, whether by considering the estate not to have become vested until the death of *Bacon Frank*, or that having become vested in the defendant at his birth, it afterwards was divested on his becoming the eldest son, the intention of the testatrix will be carried into effect. [*483]

It has been argued, that the law leans much in favor of the vesting of estates. There is no doubt of it. There are certain technical rules with regard to the vesting and divesting of estates: but, whether an estate is to vest or divest, depends on the intention of the testator fairly to be inferred and collected from the words of the will. And, however imperfectly and untechnically the will may have been drawn, still it must be construed from the words the testatrix has used, and according to the common sense and meaning of those words. According to my understanding and my apprehension, when this testatrix excludes the *first*, she means the *first born* son; when she excludes the *eldest* son, she means to exclude all the family of *Bacon Frank*, who shall answer that description of first or eldest at the time of his death: and, therefore, under the circumstances of this case, I consider that this estate should go to the lessor of the plaintiff. It appears to me, that *that* is the meaning of the exception.

I am, therefore, of opinion, that the judgment of the Court of King's Bench ought to be reversed.

RICHARDS, C. B. Having considered this case with all the diligence which its importance requires, I cannot bring my mind, on the subject which has been submitted *to us, to the conclusion which has just been stated. The question has been considered in two ways. It is said, that the limitation to the second, third, fourth son, &c. is a vested limitation; but that afterwards [*484]

it divested. If that be not the true construction of this will, it has been argued that it is a contingent remainder to the second, third, and other sons of *Bacon Frank*; and that the contingency is to depend on the circumstance annexed to the time of the death of *Bacon Frank*, the tenant for life.

Now I concur, and every body must perfectly concur in so thinking, that the intention of the testatrix is to govern the construction of this will. And the great difficulty which courts of Justice have, is to find out what the intention is, when it appears doubtful. But I have, from long experience, been extremely fearful of adopting as a system, a theory of what may be the supposed intention of the testator, and bringing every possible argument to support my system. I am perfectly persuaded that *that* is not the just mode of collecting the intention of the testatrix. We must collect it from the paper itself. And what that intention really is, is not to be taken from a part of the will; but by collecting it from an accurate and careful attention to the will throughout. If she expresses an intention, and when I construe it, it becomes absurd, I am not so to construe, unless there are expressions enough to confine me to say that that is the intention, and that sufficiently strong to exclude any other supposition.

In considering this case, let us see what the words of the will clearly are. First of all, this estate is given to *Bacon Frank*, and then to the second, third, fourth son, &c. except the first or eldest son, and to the several and respective heirs male of the body and bodies of every such son and sons, except of the first or eldest son. Here then there is, in the words, the clearest intention that
 *485] can be expressed, that on the death of *Bacon Frank*, a vested remainder in possession should be given to the second, third, and fourth son, &c. This remainder is expressly given to the second son, &c.; the son excepted was the *first or eldest*. You cannot give it to the second son without excluding the first or eldest son. Then it is very truly said, though it is a vested remainder, it may be divested. Beyond all question it may; but I must find words in the will to show that the testatrix did really mean to give it, in this event, to any other person: I must see the intention signified some how or other; and that I do not see in any part of this will. It is not possible, without adding words to the will, to say that the first remainder to the second son was divested by the words of the will; nor, on the other part of the case, is it a contingent remainder. There is nothing of contingency expressed; and, in order to make it contingent, we must introduce some such words as these: "I give the estate to the use of the persons who shall be, at the death of *Bacon Frank*, the second, third, fourth son, &c." Now, here there are not any words of that description—there is no contingency described. If you adopt this construction, you must go on with the exception much farther than the words import: you must give it to the son, who shall be the second son at the death of *Bacon Frank*; holding the words, "except the first or eldest son" to mean, except the person who shall be the first or eldest son at the death of *Bacon Frank*. Now there are no words to that effect; and though I may be of opinion with others that, if the testatrix had been applied to, and if the drawer of the will had pointed out to her certain inconveniences which might result from the devise, she might have directed him to prevent them; yet we cannot act on that supposition. I conceive the absurdities which would arise from a different construction militate very much against imputing such an intention to these words.

*486] There is another case which may be put. Supposing for a moment, that the father had had issue two sons, and had died, and that the eldest son had died in the course of the next hour without issue, the second son would have taken the paternal estate. To be sure it is very hard, that after the death of the eldest son, the family estate should go to the second son, who would also have the devised estate; to the second son, who would thus have both estates: and yet, beyond all doubt, that must be the necessary result. The second son would take both estates, though all the younger branches of his family, and their issue, might be unprovided for.

Without entering more at large into the case, I shall only further say, that I concur entirely with my brothers, who formed the majority of the Court of King's Bench.

GIBBS, C. J. From the respect which is due to the opinion of the noble and learned Judge of the Court of King's Bench, and also from the respect which is due to my learned brothers, who have entertained a different opinion from that of the Court of Common Pleas, I have been led to consider this case with all the attention which is due to it.

The question in this case turns upon the limitation of the remainder to *Bacon Frank's* second son by his wife *Catherine*.

At the death of the testatrix, *Bacon Frank*, had no son : at that period, therefore, the remainder was contingent.

He afterwards had four sons, two of whom were born each in the lifetime of an elder brother ; so that whether the term, " second son," means second born, or second to an existing elder son, here was a son in *esse* during *Bacon Frank's* life-time, who then answered the description in the will ; and the question is, whether the remainder *vested absolutely in him on his coming in *esse*, [*487 as the defendant contends ; or whether, as the plaintiff insists, it remained contingent during the life of *Bacon Frank*, his father, or for any other period ; or, at all events, if it did vest in a second son, whether it was divested on his becoming an eldest son within such period.

By the general rule of law, a contingent remainder devised to a first, second, or other son not in *esse*, would vest absolutely in such son as soon as he came into being, unless there was a clear intent expressed or implied, that it should remain contingent until some later specified time, or should divest again on some certain event.

If the intent be left doubtful, the general rule must govern ; but where the intent is clear, and sufficient words are found in the will to give it effect, the construction must follow the intent, and must always prevail, notwithstanding any inconveniences which may arise from it. These rules are too well established to be brought into doubt ; and the only question is, upon the intent and the sufficiency of the words to give effect to it.

The lessor of the plaintiff insists, that it appears from the limitations in this will, considered with reference to the state of the property belonging respectively to Mr. *Bacon Frank*, and Mr. *William Sotheron*, each of whom had married a niece of the testatrix, and to the state of their respective families at the time when the will was made, that it was her intention by it to keep her own estate separate from that of Mr. *Bacon Frank*, and Mr. *Sotheron* ; that this intention can only be effected by construing the devise to the second son of Mr. *Bacon Frank*, to mean the second son *at the time of his death*, or, as it was expressed by Mr. *Scarlett*, the second son at the time when the contingent remainder fell in, and that such construction ought therefore to prevail.

*The special verdict finds, that Mr. *Bacon Frank*, at the time of making the will, was possessed of real estates in *Yorkshire*, of some as [*488 tenant in tail, and of the rest as tenant in fee simple, of considerable annual value, and that he had then no son.

That Mr. *William Sotheron*, was also in possession of considerable real estates, of part as tenant for life, with remainder to his eldest son in tail, and of the rest as tenant in fee ; and it appears that he had then two sons at least, of whom *Frank Sotheron*, the devisee, was the youngest.

In this state of things the testatrix made her will, and by that will she gave (what has not been much adverted to in the course of the argument) part of her property to her niece *Catherine*, the wife of *Bacon Frank*, for life ; and then subject to that, she gave what she devised to her, and all the residue of her manors and estates, &c. to Mr. *Bacon Frank*, for life ; and subject to this life estate, she limited it to the second, third, fourth son, &c. &c. The words have

been so frequently stated that it is not necessary for me to repeat them, because they must be fresh in the memory of every one present who has heard them. Now I think it is very probable that the testatrix gave this remainder to the second son of *Bacon Frank*, (no son being then born,) because she supposed, that an eldest son would succeed to his father's estates, and that she limited the remainder over to *Frank Sotheron*, the then youngest son of his father, with the same view with regard to Mr. *Sotheron's* estates; but here she has stopped.

She says not a word of keeping the two estates separate; she makes no provision for that purpose, except as it may be effected by the selection which she has made of those who should first succeed to the remainder, and I am by no means satisfied that her intention went further than this.

*489] It is one thing to select an object for your bequest, because he does not then stand next in the succession to his father's estate, and, therefore, is not likely to take both; and another thing, to provide against the event of his attaining that situation at any future time.

Many a testator has chosen a devisee, because he was then a younger son, without guarding, or intending to guard, against the event of his becoming afterwards an eldest son. In this very will it is clear, that the testatrix has in one instance done this.

It was confessedly as much her object to keep her estate separate from that of Mr. *Sotheron*, as from that of Mr. *Frank*.

Mr. *Sotheron*, had two sons living, if not more, when she made her will, and she has limited the remainder after failure of the issue male of Mr. *Frank's* second and younger sons, to *Frank Sotheron*, the younger son of Mr. *Sotheron*, by name, and to his first and other sons successively in tail male, without guarding against the event of his becoming an eldest son. The remainder vested absolutely in him and his sons, whatever change might take place in their condition.

Perhaps the testatrix selected him as the object of her bounty, because he was then a younger son; but she has left it to the chance of events, whether he should continue so or not.

When I find her acting thus with the family of Mr. *Sotheron*, why am I to suppose that she had a different intention, or meant to carry her caution further, with respect to the family of *Bacon Frank*?

I infer rather, that, as far as circumstances would permit, her intent was the same, and that she meant to give this remainder absolutely to him who should first become the second son of *Bacon Frank*, as she gave the remainder over absolutely to him, whom she found a younger son of Mr. *Sotheron*, without *490] concerning herself about any subsequent change which might take place in the condition of either of them. It has been very justly observed, that the will is technically drawn, and with a perfect knowledge of the value of every legal expression used in it.

If she had such further intent, as the counsel for the plaintiff insists that she had, it would have been easy to have inserted apt provisions in her will, which would effectually have answered such intention; but I find no expressions in this will which I can so control.

The construction offered to us is, that this remainder to the second son of *Bacon Frank* continues open, or is subject to be divested during the life of *Bacon Frank*, or, as was said in the last argument, until the remainder falls in.

Before I can adopt this construction to satisfy a supposed intent which the testatrix has not expressed, I must look to all the consequences which would follow from it, and say, whether I think that in the face of all those consequences, the testatrix could mean that it should be adopted.

She certainly intended that the second and other younger sons of *Bacon Frank* and their issue male should succeed to her estate in the order of seniority, and that it should not go over to the *Sotherons* until such issue wholly failed; but the construction proposed would in many events disturb this order

of succession in the family of the *Franks*, and in other events, would send the estate over to the *Sotherons* while issue remained of the second and other sons of *Bacon Frank*, who were intended to take it.

Suppose *Bacon Frank* to have had three sons, and that the second died in his life-time leaving issue male, and that then *Bacon Frank* died. Upon this construction, the third son who is now the second, would have succeeded to the estate of the testatrix, the eldest son would have *taken the paternal estate, and the issue of the second son would have been excluded from [*491 both estates.

So, if the eldest son had died in the lifetime of his father, *Bacon Frank*, leaving issue male to inherit the paternal estates, the second son must have given way to his next brother, having become second son, and have lost the devised estate without acquiring any title, actual or presumptive to the paternal estate.

So, if there had been six or more younger sons of *Bacon Frank*, and each of them had died in the lifetime of their father, leaving issue male; according to this construction the devised estates would have gone over the *Sotherons* in prejudice of such issue, although the paternal estate of the *Franks* would have fallen upon none of them, but have rested with the eldest son.

These and other consequences of the same sort have been so fully pointed out in the arguments here, and in the judgment of the Court of King's Bench, which is already in print, that I need but thus shortly advert to them. They are many in number, and so likely to take place, that I think they could not have been overlooked. They cross the obvious intent of the testatrix, and in my opinion raise strong and insuperable objections to the construction out of which they spring.

Besides, why is this caution, if adopted at all, to stop at the death of *Bacon Frank*? I find nothing in the will which points out this limit, and it might legally be carried farther, and Mr. *Scarlett* in his argument did carry it to the falling in of the contingent remainder.

If it be said that it was to be kept open until the remainder fell into possession, this might happen at different times in different parts of the estate; for, if *Bacon Frank* had died before his wife, the part in which he had a life-estate would have vested immediately in his then second son, and her part would have remained contingent during *her life-time, and might have gone off to another branch, which could never have been intended by the testatrix. [*492

But, besides this, however probable it may be thought, that the testatrix intended to keep the two estates separate, I can look only to the words of her will for the provisions by which this intent is to be carried into execution.

Such is the doctrine of Lord *Hurdwicke* in *Lomax v. Holmden*, 1 Ves. 294, and I find no words in the present will which can possibly bear the construction contended for.

I am of opinion, therefore, that, as soon as a second son of *Bacon Frank* came into being, the remainder vested in him, and was not liable to be divested by any subsequent events; and, consequently, that the judgment of the King's Bench must be affirmed.

I am directed to state, that my brother *Graham* agrees in opinion with my brother *Wood*; and that my brother *Dallas* agrees with the Lord Chief Baron, my brother *Burrough*, and myself.

Judgment affirmed.

STOKES, WIDOW, v. TWITCHEN.

[2 Moore 538. S. C.]

The plaintiff executed an indenture of apprenticeship (to which was appended a printed notice for the insertion of the premium, &c., under statute 5 G. 3. c. 46.) by which she bound her son apprentice to the defendant, and she paid a premium. The indenture did not contain any statement respecting the premium, and was not stamped. The indenture being void for want of such statement, and not having been stamped within time: Held, that the plaintiff was not an innocent party, and that she could not recover the apprentice-fee from the defendant, though paid without consideration, the indenture being void.

THIS case, which was in substance as follows, was argued on a former day in this term, (27th May.)

An action of *assumpsit* was brought to recover the sum of 60*l.* for money lent and advanced, and for *money had and received by the defendant *493] to the plaintiff's use, and for money due on an account stated between them, to which the defendant pleaded the general issue, gave a notice of set-off, and paid 30*l.* into court generally, under the common rule. The cause was tried before Gibbs, C. J., at the *London* sittings after last *Easter* term, when the plaintiff proved that she had advanced to the defendant the sum of 60*l.*, and the defendant proved, and the jury by their verdict found, that the said sum of 60*l.*, which he admitted to have received from the plaintiff, and for which the action was brought, was advanced by the plaintiff to the defendant as a premium or apprentice fee with her son, upon an indenture of apprenticeship, by which it was witnessed, that *Robert Stokes*, the son of the plaintiff, of his own free will, and with her consent, did put himself apprentice to the defendant, *J. T.*, of *Fulham*, butcher, to learn his art, for the term of seven years, during which time the apprentice should serve his master faithfully, &c., and in all things behave as a faithful apprentice; and that the defendant, in consideration of such services, would teach and instruct the apprentice in the art or mystery of a butcher, and provide board and lodging for him during the said term; and that the plaintiff should find and provide for her son, clothes and all other necessaries during the term. Appended to the indenture, (the body of which was printed,) were the following printed instructions under statute 5 G. 3. c. 46. s. 19.

N. B. The indenture, covenant, article, or contract must bear date the day it is executed. And what money or other thing is given or contracted for with the clerk or apprentice, must be inserted in words at length, and the duty paid at the stamp office, if in *London*, or within the weekly bills of mortality, within *494] one month after the execution; and if in the country, *and out of the said bills of mortality, within two months, to a distributor of the stamps or his substitute, otherwise the indenture will be void, the master or mistress forfeit 50*l.*, and another penalty, and the apprentice be disabled to follow his trade or be made free.

The indenture was executed by the plaintiff, who signed her mark, and by the apprentice and the defendant; but it contained no account of the payment or receipt of the premium of 60*l.*, and not being stamped pursuant to the various acts of Parliament relating to the duties to which such instrument was liable, the plaintiff's counsel insisted that the defendant was not at liberty to prove that such sum was paid as an apprentice fee; and that, at all events, she was entitled to recover it back, for the indenture being void, the consideration on which it was advanced had failed. The question for the opinion of the court was, whether the plaintiff was entitled to recover? If the court should be of that opinion, a verdict was to be entered for 30*l.*; if not, a nonsuit was to be entered.

Vaughan, Serjt., for the plaintiff. If it be urged that the rule *in pari delicto*

potior est conditio defendentis applies to this case, it is too late to impugn the doctrine; though the policy of the law might have been better if it had never been admitted. But these parties are not *in pari delicto*, for the legislature has made a marked distinction between them. The thirty-second section of the stat. 1 Ann. c. 9. directs that the duty on the premium shall be paid by the master; and the thirty-fifth section imposes a forfeiture on the master if the directions therein laid down are not complied with. By the thirty-sixth section, the indenture must be stamped within a month; and the thirty-ninth section makes indentures void, in which the sum received with the apprentice is not inserted, or which are not stamped according to the provisions of the act, and incapacitates *the apprentice from being free and [*495 exercising his trade. A series of statutes, namely 9 Ann. c. 21. ss. 65, 66.—18 G. 2. c. 22.—5 G. 3. c. 46. s. 19, distinguish between the parties, making the master liable to the penalties therein imposed. The indenture might have been stamped within a month, the plaintiff, therefore, might have executed it unstamped in perfect innocence: for it was the duty of the master to have had it stamped, and he had a month from the time of the execution for getting that done. Instead of doing his duty, the defendant comes into court, calls for the unstamped indenture, and endeavors to avail himself of his own wrong, and of an instrument which his own neglect has made, according to the statute, utterly void, and available for no purpose either in any court of law or equity. [Gibbs, C. J. It has been decided over and over again that the meaning of the act is, that the instrument shall not be available for the purposes for which it was entered into.] Then the plaintiff is not *particeps criminis* so as to lose her right of action against the defendant, *Williams v. Hedley*, 8 East, 378, and may recover the premium paid, *Jaques v. Golightly*, 2 W. Bl. 1073, *Jaques v. Withey*, 1 H. Bl. 65. The cases of *Browning v. Morris*, Cowp. 790, *Lowry v. Bourdieu*, 2 Doug. 468, *Andree v. Fletcher*, 3 T. R. 266, and *Howson v. Hancock*, 8 T. R. 575, are all distinguishable from the present case, for in all of them, the parties were *in pari delicto*. But, in this transaction, there is no moral guilt on the part of the plaintiff; the defendant has the whole of the money; the contract being void, the apprentice derives no benefit from it, and the plaintiff is entitled to recover the premium from the defendant, who has rendered the consideration void, and now seeks to reap benefit from his illegal and immoral conduct.

**Pell*, Serjt. *contra*. The question is, whether if *A.* and *B.* collude together to defraud the revenue, the court will assist either party to [*496 recover a sum from the other, which has been paid under that illegal contract. So far from the rule of law *potior est conditio defendentis* being founded in bad policy, it is a matter to be lamented that the rule has ever been broken in upon, and so thought *Mansfield*, C. J.† To the statement that the plaintiff paid her money in ignorance, the answer is, that, at the bottom of the instrument, is printed a caution as to the insertion of the premium at full length. It is said, that the parties are not *in pari delicto*, nor need the guilt of both be exactly equal, the question only is, are both criminal. The case of *Williams v. Hedley* is not applicable; for it is not made criminal to borrow money at usurious interest, though it is made criminal to lend it at that rate.

As to the argument founded on the assertion, that it was incumbent upon the master to get the deed stamped, the answer is, that he could not get it stamped. The plaintiff has prevented him from doing so, by executing the instrument without the insertion of the premium in words at length, or indeed without the insertion of it at all. He could not, therefore, get it stamped with an *ad valorem* stamp, according to the sum expressed, for there was no sum expressed. However the parties might have colluded to defraud the revenue, if the plaintiff had inserted the amount of the premium, the defendant would have had a

† *Buck v. Walsh*. 4 Taunt. 290.

month's *locus penitentiz*; of which, as the case stands, he is deprived. The principle which governed the case of *De Metton v. De Mello*, 12 East, 234, was, that where parties collude for the purpose of fraud, courts will not interfere to assist them to recover money supposed to be due. That principle must *497] govern this question; for if ever there was a case wherein parties endeavored to collude for the purpose of fraud, this is that case.

Vaughan, in reply. The case of *De Metton v. De Mello* does not apply to this question. There the plaintiffs had colluded with the defendant to make *French* property appear *Portuguese*, and so to withdraw it from the jurisdiction of the Court of Admiralty in *England*; and it was well held, that the plaintiffs were estopped from setting up a claim in another court of justice to recover it from the defendant as *French* property. But here, the plaintiff's criminality cannot be inferred: she cannot even write, which is strong to show that she could not be, as contended, the prime mover in this fraud. The case of *Williams v. Hedley* recognises the principle contended for by the plaintiff, who is entitled to recover.

Cur. adv. vult.

And now, the judgment of the court was delivered by

GIBBS, C. J. This was an action in which the plaintiff sought to recover the sum of 60*l.*, paid as a premium with her son to the defendant, under an indenture of apprenticeship, on the ground that the premium was not inserted in the indenture, and that, therefore, the indenture was void and the money paid without consideration. Supposing the plaintiff to be an innocent party, she would certainly be entitled to recover the money so paid, as being paid without consideration; but any plaintiff who seeks to recover on such grounds, must come into court with clean hands. It has been contended for the plaintiff in this case, that no imputation rests on her; for that it was the master's duty to *498] insert the premium, on whom alone the legislature *imposes the penalty for the default. This latter proposition is true, and, if the case rested here, I should be of opinion that the plaintiff was entitled to recover: but there are other circumstances in this case; circumstances which deeply implicate the plaintiff in a collusion for the purpose of fraud. With the notice before her eyes, she executed the indenture without the insertion of the premium, and, by her act, endeavored to give validity to an instrument which had not that in it, which the legislature has prescribed for giving effect to the provisions of the revenue. The legislature marks out the master alone for punishment; but all are involved in the offence who lend assistance to the master in giving effect, as this plaintiff has done, to unlawful purposes. In this case, both the defendant and the plaintiff were parties to the offence. The former, by concealing from the public and the revenue officer the amount of the premium, and so defrauding the revenue; the latter, by enabling the defendant to conceal that amount from the revenue, whereby she was likely to find the defendant content with a less premium than he might otherwise have been disposed to take. Under these circumstances the plaintiff cannot be considered as an innocent party; and we are of opinion, that she is not entitled to recover.

Judgment of nonsuit.

*ROSE et al., Assignees of SMART, v. HART.

[2 Moore 547. S. C.]

TROVER for cloths deposited by the bankrupt previously to his bankruptcy with the defendant, a fuller, for the purpose of being dressed; Held, that the defendant was not entitled to detain them for his general balance for such work done by him for the bankrupt previously to his bankruptcy; for that there was no mutual credit within stat. 5 G. 2. c. 30. s. 28.

TROVER for cloths deposited by the bankrupt, previously to his bankruptcy, with the defendant, who was a fuller, for the purpose of being dressed. At the trial, before *Holroyd, J.*, at the *Salisbury Spring* assizes, 1817, it appeared, that when the cloths were so deposited, there was a debt due from the bankrupt to the defendant, for other cloths dressed by the latter. After the bankruptcy, the plaintiffs tendered the sum due for dressing the cloths in question to the defendant, who refused to deliver them up, without payment of the whole debt due to them from the bankrupt. They then brought their action. For the defendant it was contended, that the case came within the principle laid down in *Olive v. Smith*, 5 Taunt. 56, and that he was entitled to retain the cloths for his general balance. The jury found a verdict for the plaintiff; and, *Holroyd, J.*, having reserved the point,

Pell, Serjt. in *Easter* term, 1817, moved for a rule *nisi* to set aside the verdict and enter a nonsuit, on the ground urged at the trial, and he cited *Ex parte Deeze*, 1 Atk. 228, as in point, and observed, that the principle of the cases which contradicted the doctrine there laid down was vicious, inasmuch as it went to destroy the law of lien.

GIBBS, C. J. You are aware of the case of *Green v. Farmer*, 4 Burr. 2214, which by the bye I may say has been frequently disregarded. In a case in which I have the *brief, and in which case Lord *Ashburton* was, a [*500] special custom for dyers to have their general lien was proved; and, notwithstanding *Green v. Farmer*, that custom was acted upon in that case, and has been many times since recognised. The case *Ex parte Deeze* is certainly contradictory to the case *Ex parte Ockenden*, 1 Atk. 235, subsequently decided. The question is of the utmost importance, and we are quite open to hear it discussed. Take your rule.

Rule *nisi* granted.

In the following *Trinity* term cause was shown by

Lens, Serjt., who contended, that Lord *Hardwicke*, in *Ex parte Ockenden*, recognised by *Mansfield, C. J.*, in *Green v. Farmer*, had much narrowed the extensive construction which he had put in *Ex parte Deeze*, on the words "mutual credits," in the stat. 5 G. 2. c. 30. s. 28, and had excluded cases like the present from its operation; and referred to the cases of *Chase v. Westmore*, 5 M. & S. 180, where a point similar to the present was made, but the court, thinking that that case did not involve the question of mutual credits, gave judgment on the point of lien. He also cited *Birdwood v. Raphael*, 5 Price, 593, and contended, that the decision in *Olive v. Smith* did not apply to the present case.

Pell was then heard in support of the rule. If the defendant had sold these cloths, and the assignees had brought their action for money had and received, they must clearly have allowed to the defendant the amount of their general balance against the bankrupt before they could have recovered the difference, if any, from the defendant. Mutual credit is used as synonymous with mutual trust. "Where there is a trust between *two men, on each side, that makes a mutual credit."† The case *Ex parte Deeze* and the whole [*501]

† Per Bullar, J., *French v. Fenn*, Co. B. L. 536, 7th ed.

reasoning of Lord *Hardwicke* on the subject of mutual credit in that case (which is recognised and confirmed in *French v. Fenn*, in *Smith v. Hodson*, 4 T. R. 211, and both by *Gibbs, J.*, in his statement of his opinion at the trial in *Olive v. Smith*, 5 Taunt. 58, and subsequent, by the whole court, in their final decision) is most strong for the defendants; but, if the case *Ex parte Ockenden*, in which no judgment was given, is to be upheld against the case *Ex parte Deeze*, confirmed over and over again by subsequent decisions, then it is admitted, that the defendants cannot succeed.

It is true, that this is an action of trover, and no case of this precise nature has been decided; but the plaintiffs, by their choice of action, can never prevent the defendant from having the benefit of this statutable lien. In *Jennings v. Rundall*, 8 T. R. 335, the plaintiff shaped his case in tort, in order to deprive the defendant of the benefit of his infancy; but the defendant pleaded his infancy, and it was holden a good plea. In *Ex parte Deeze* Lord *Hardwicke* says, "It is very hard to say that mutual credit should be confined to pecuniary demands, and that if a man has goods in his hands belonging to a debtor of his, which cannot be got from him without an action at law or bill in equity, it should not be considered a mutual credit." "There have been many cases which the clause of the act has been extended to, where an action of account would not lie, nor could this court, upon a bill, decree an account." These strong expressions acquire double strength when the judgment of *Mansfield, C. J.*, in *Olive v. Smith* is referred to. "I should have thought that the words of the statute meant only money transactions; but if the extension of mutual credit be, as it *has been contended, a mistaken doctrine, the mistake is so *502] deeply rooted, that it would be rash to overturn it; and there is a great deal of justice in the determination at which not only the Court of King's Bench but the Court of Chancery have arrived on this point." This is hardly saying less, than that the statute extends to cases of trover, and the whole judgment lays down the rule of extension on the broadest ground; a rule resting as much on sound law as it does on justice. [*Burrough, J.* Is it the true meaning of the act, to extend the doctrine of mutual credit to cases where the goods are not ultimately to be turned into money? *Dallas, J.* Where the goods are specifically to remain as goods?] Lord *Hardwicke*, in *Ex parte Deeze*, expressly goes on that ground. [*Burrough, J.* In *Lanesborough v. Jones*, 1 Peere Wins. 325, which was a decision on stat. 4 Ann c. 17, s. 11, the judgment of Lord Chancellor *Cowper* went on the ground that there was a plain mutual credit.] In *French v. Fenn*, if trover had been brought, it must have been brought on the same ground on which it may be brought here. [*Burrough, J.* No. In *French v. Fenn*, the pearls were sent out on an express contract to be sold, and, though the sale was after the bankruptcy, the contract was before the bankruptcy.] In *Smith v. Hodson*, the assignees might have brought trover; and the whole judgment in that case goes to show that if the action had been so shaped, the assignees might have recovered. [*Gibbs, C. J.* The judgment of the court in *Smith v. Hodson*, as to the probable success of the assignees, if they had brought trover, goes on the ground of fraud and undue preference, with which that case was tainted.] The language of the courts in *Ex parte Deeze*, *French v. Fenn*, and *Olive v. Smith*, is clear to show that the form of action can make no difference; and the plaintiffs are not *503] to be shut out from the benefit of the rule so broadly laid down and *so strongly confirmed, because this is the first action for trover for goods in specie, on which the point has arisen.

Cur. adv. vult.

And now, the case having stood over till this day, *GIBBS, C. J.*, delivered the judgment of the court. This was an action of trover for cloths left by *Smart* before his bankruptcy, with the defendant, who was a fuller, to be dressed.

There was then a balance due from the bankrupt to the defendant, for work done on other cloths.

The assignees tendered to the defendant the sum due for work done on the cloths in his possession, and demanded them from him; but the defendant refused to deliver them up, unless he was paid his general balance.

The question was, whether he were entitled to retain them for that balance? And Mr. Justice *Holroyd*, before whom the cause was tried, at the *Spring assizes for Salisbury*, 1817, reserved the point for the opinion of the court; and we are of opinion that the defendant, who received these cloths for the purpose of dressing only, had no right to detain them for his general balance.

He founds his claim on the ground of mutual credits, mentioned in stat. 5 G. 2, c. 30, s. 28, and the construction which has been put upon that statute.

The case *Ex parte Deeze*, 1 Atk. 228, is not distinguishable from the present. There, a packer claimed to retain goods, not only for the price of packing them, but for a sum of 500*l.*, lent to the bankrupt on his note; and Lord *Hardwicke* determined that he had such right, on the ground of mutual credits, to which he gives a very extensive effect, and says, that the clause relative to them has always received a very liberal construction.

*This doctrine, if it were supportable, would apply directly to the present case, and would establish the defendant's right to retain for his [*504 general balance.

But, in the case *Ex parte Ockenden*, which came before Lord *Hardwicke* about six years after the former, he very much narrows the extensive construction that he had before put on the words "mutual credits," in the stat. 5 G. 2, c. 80, s. 28, and determines, in express terms, that a case like the present does not fall within them.

That the cases *Ex parte Deeze* and *Ex parte Ockenden* are accurately reported by *Atkyns*, we have the authority of Lord *Mansfield*, in *Green v. Farmer*, 4 Burr. 2222, who confirms them by his own notes.

It appears, therefore, that the final opinion of Lord *Hardwicke*, after a very full consideration of the subject, would exclude the present case from the protection of the statute as a mutual credit, though he admits that the words mutual credits have a larger effect than mutual debts, and that under them many cross claims may be allowed in cases of bankruptcy, which in common cases would be rejected.

I am not aware of any later decision upon this subject, until the case of *French and Another, Assignees of Cox v. Fenn*, which occurred in the year 1783, and is very fully and correctly reported in *Cooke's Bankrupt Laws*, 536, 7th edition.

Cox, the bankrupt, was indebted to *Fenn*, and had entrusted him with his share or interest in a string of pearls, to be sold by *Fenn*, and the profit on such share to be paid to *Cox*. *Fenn* sold the pearls after *Cox's* bankruptcy, and *Cox's* assignees brought an action against *Fenn* for his share of the profit. On the part of the defendant it was insisted, that there was a mutual *credit, though not a mutual debt, at the time of the bankruptcy, and that one [*505 could not be demanded without satisfying the other.

The doctrine of Lord *Hardwicke*, in *Ex parte Deeze*, was relied on by the counsel, and seemed to be fully adopted by the court, without adverting to the qualification which it received from the case *Ex parte Ockenden*; and, applying that doctrine to the case before them, they determined, that *Fenn* was protected from the claim of *Cox's* assignees, by the clause of mutual credits.

French v. Fenn has been followed by a string of causes running through a period of more than thirty years, all professing to depend upon it, some of them containing the fullest approbation of *Ex parte Deeze*, from the bench.

Whatever I might think of the original decision, I could not persuade myself to break in upon a class of cases so long established; and if they could not be supported without carrying the doctrine found in *Ex parte Deeze* to its fullest

extent, speaking for myself, I should be ready to follow it, rather than overturn all that has been settled upon this subject for such a length of time.

But, it is first to be considered, whether these cases may not be supported by a construction of the statute, which will not go to that extent, and will leave the opinion of Lord *Hardwicke* in the case of *Ex parte Ockenden* untouched.

By the twenty-eighth section of 5 G. 2, c. 30, it is enacted, "that where it shall appear to the said commissioners or the major part of them, that there hath been *mutual credit* given by the bankrupt, and any other person, or *mutual debts* between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners or the major part of them, *506] or the assignees of such bankrupt's estate, shall state the *account between them, and *one debt* may be set against another; and what shall appear to be due on either side, on the balance of such account, and on setting such *debts* against one another, and no more, shall be claimed on either side respectively."

Something more is certainly meant here by *mutual credits* than the words *mutual debts* import; and yet, upon the final settlement, it is enacted merely that one *debt* shall be set against another. We think this shows that the legislature meant such *credits* only as must in their nature terminate in *debts*, as where a debt is due from one party, and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt, or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with: but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and, therefore, it is not a credit within the meaning of the statute.

This principle will support all the cases from *French and Fenn* to *Olive v. Smith*, which is the last that has occurred.

In *French and Fenn* there was a debt due from *Cox* to *Fenn*, and *Cox* entrusted *Fenn* with his share in the pearls *for sale*, which when sold would constitute a *cross debt* for the produce from *Fenn* to *Cox*.

In *Smith v. Hodson*, 4 T. R. 211, the defendant had entrusted the bankrupts with his acceptance, which he was liable to pay, and which when paid would create a debt from the bankrupts to him for the amount.

*In *Parker v. Carter, Co. Bankrupt Laws*, 548, and *Olive v. Smith*, *507] the bankrupts were indebted to the defendants, and the bankrupts delivered policies of insurance to the defendants to collect losses under them, which, when collected, would make the defendants *their debtors* for the amount.

So, in all the other cases which have occurred upon this subject, it will be found, that that which has been allowed as a mutual credit has always been of such a nature as must terminate in a *cross debt*.

To this extent we think the statute may be carried, but no farther; and we follow the final opinion of Lord *Hardwicke*, in determining, that the delivery of these cloths to the defendant, for the purpose of being dressed, does not form an article of mutual credit in his favor within the fair construction of the clause relied on.

The *postea* must, therefore, be delivered to the plaintiffs.†

† *Dallas*, J. was absent from illness, but concurred in this judgment, *ex relatione Gibbs*, C. J.

See *Sampson v. Burton*, 2 Brod & Bing. 89., particularly the judgment of *Burroughs* J.: and, in page 96. of that report, for "1818," read "1817."

[See the case of *Easum et al. v. Cato*, 5 Barn. & Ald. 861.]

*HOLMES v. BLOGG.

[2 Moore 552. S. C.]

If an infant pays money with his own hands without a valuable consideration, he cannot get it back again. Therefore, where an infant paid money to *A.* as a premium for a lease, and enjoyed the same for a short period during his infancy, but avoided it after he became of age, and quitted the premises: Held, that he could not recover the sum so paid, in an action against *A.* for money had and received.
[*Ante*, 35.]

ASSUMPSIT by the plaintiff to recover 157*l.* 10*s.*, paid by him during his infancy to the defendant. Plea, general issue. At the trial before *Burrough*, J., at the *London* sittings after last *Michaelmas* term, in addition to the facts stated when this case was before the court in *Hilary* term last, *Ante*, p. 35, it appeared that when the arrangement with *Taylor* was entered into by the defendant, the plaintiff was not in business, having quitted it when he became of age, and that, in a subsequent conversation between the plaintiff and *Taylor* respecting the lease, the former declined having any thing to do with it; that the plaintiff had never slept in the house after he became of age, and that his name was soon afterwards taken off the door. For the defendant, it was contended that under these circumstances the plaintiff could not recover. *Burrough* J. was of opinion that the action was well brought, but reserved the point. The jury found for the plaintiff; and, in *Hilary* term last,

Copley, Serjt., obtained a rule *nisi* to set aside this verdict, on the ground that there had been no disaffirmance of the contract; and that the sum sought to be recovered, having been paid on the joint account of the plaintiff and *Taylor*, this action by the plaintiff could not be maintained.

Best, Serjt., in the last term, showed cause, and made two points; first, that, if disaffirmance were necessary, *the plaintiff, upon coming of age, had disaffirmed the contract. Second, that disaffirmance was not necessary, and that infants were not bound by any contract unless there were affirmance by them after coming to full age. In addition to the cases cited in favor of the plaintiff on the former discussion, the following authorities were relied on in support of these points. *Com. Dig.*, 'Tit. Infant, c. 2, *Smith v. Low*, 1 Atk. 489, *Nightingale v. Earl Ferrers*, 3 Peere Wms. 206, *Litt.*, s. 258.

Copley, in support of the rule, argued on the point of the plaintiff's liability for rent to the same effect, in substance, as he did in showing cause on the former occasion, referring in addition to *Com. Dig.*, Tit. Infant, c. 3; and urged that, as the payment made was a partnership payment, the plaintiff's remedy was against *Taylor* for contribution, but that he could not recover the money so paid in the present action.

Cur. adv. vult.

And now,

GIBBS, C. J., delivered the judgment of the court. This was an action by *Holmes* against *Blogg* for money had and received; and the ground on which the plaintiff sought to recover is founded on the following facts. *Holmes*, an infant, together with *Taylor*, had agreed with the defendant to take the lease of his house, and to pay to him a certain sum of money for that lease. Part of the money was paid down, and security was given for the residue. In point of fact, the money paid was the money of *Holmes*, at that time an infant. The infant avoided the lease when he came of age, as he had a *right to do; and, having avoided the lease, he brought this action for the money paid [*510 to the defendant, on the ground that the consideration having failed, he was entitled to recover it. There has been a good deal of argument on the subject of this avoidance, and, indeed, it has been treated as the main question: but

another question arises, namely, whether, supposing the lease to have been avoided, the plaintiff could recover the money which he has paid for it during his infancy. I confess this action is quite new to me, and I thought, on principle, that it could not be maintained. I thought, too, that there was much in my brother *Copley's* argument, that the money paid could not be taken to be the money of the infant alone but that it must be taken to be the joint money of the infant and *Taylor*; and that, if it was paid as their joint money, it would be money advanced by *Holmes* in the first instance to the partnership of *Holmes* and *Taylor*, and then paid as partnership money by them to *Blogg*. But I think further, that, supposing this money to be the sole property of the infant, he cannot recover. He may, it is true, avoid the lease; he may escape the burthen of the rent, and avoid the covenants; but that is all he can do. He cannot, by putting an end to the lease, recover back any consideration which he has paid for it: the law does not enable him to do that. I cannot find this decided; for I cannot find that any such action as this has ever been brought; but Lord *Mansfield* has incidentally said, that such an action cannot be brought. In the famous case of *Drury v. Drury*, 2 Eden. 39, one of the questions was, whether an infant could, by contract, bar her dower. Lord *Northington* thought that the statute applied only to adults; and the marriage of Lady *Drury* with the Earl *of *Buckinghamshire* took place

*511] on his opinion: but the case afterwards came before the House of Lords upon appeal, under the name of *The Earl of Buckinghamshire v. Drury*,† when the decree of Lord *Northington* as to this point was reversed. Lord *Mansfield* there said, in delivering his opinion, "If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again," 2 Eden. 72. What is the point here? That an infant, having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back. But the authority does not altogether stop here. In Lord Chief Justice *Wilmot's Notes of Opinions and Judgments*, 223, it appears that Lord *Hardwicke* and Lord *Mansfield* were of opinion with the majority of the judges; in which majority the learned author, then Mr. Justice *Wilmot*, was. His note of Lord *Mansfield's* judgment on this point is in these words: "If an infant pays money with his own hand without a valuable consideration, he cannot get it back again,"—*Wilmot's Notes*, 226, n. So that Lord Chief Justice *Wilmot* had himself taken a note of this declaration of Lord *Mansfield*, and laid it up among his *memoranda*, without any expression of disapprobation. He must, therefore, be taken to have adopted it.

We, therefore, think that this action cannot be maintained, upon the ground that the infant, having paid the money with his own hand, cannot recover it back again.

The other ground taken by my brother *Copley*, namely, that this was the money of the partnership, my *brother *Burrough* tells me was not

*512] taken at *Nisi Prius*. We do not, therefore, decide on that ground.

Rule absolute for a nonsuit.‡

† *Wilmot's Notes of Opinions and Judgments*, 177. S. C. 3 *Brown. Parl. Ca.* 492., 2d ed. S. C. 2 *Eden*. 60.

‡ *Dallas, J.*, who was absent on account of illness, concurred in this judgment. *Ex relatione Gibbs, C. J.*

BARNES v. EYLES.

[2 Moore 561. S. C.]

In an action of debt for an escape against the warden of the *Fleet*, the bill alleged that the prisoner was brought to the bar of C. P. by *habeas corpus*; and that thereupon the prisoner was by that court re-committed to the prison in execution, "as by the said commitment more fully and at large appears." Special demurrer, assigning for cause the omission of the averment that the commitment was of record. The court, relying on the case of *Turner v. Eyles*, (3 B. & P. 456.) gave judgment for the plaintiff; but on the distinction between that case and the present being subsequently pointed out, namely, that in *Turner v. Eyles* the objection was made after verdict, whereas here the defect was pointed out by demurrer, the court revoked their judgment, but allowed the plaintiff to amend on payment of costs. *Semble*, therefore, that on special demurrer, the omission of such averment is fatal.

DEBT against the defendant, warden of the *Fleet* prison, for an escape. The bill stated, that the plaintiff in *Easter* term, in the fifty-second year of G. 3., by the judgment of this court recovered against *Frederick Schrader*, 50*l.* 18*s.* 6*d.* for damages and costs, as by the record and proceedings thereof still remaining in the said court more fully appeared, which judgment still remained in full force; and that, in *Trinity* term, 52 G. 3., *Schrader* (then being in the custody of the defendant, then and from thenceforth being warden of the said prison of the *Fleet*) was brought to the bar of this court by the defendant, by virtue of a writ of *habeas corpus*, directed to the defendant; that thereupon *Schrader*, at the request of the plaintiff, was by the same court re-committed to the said prison in execution for the said sum of 50*l.* 18*s.* 6*d.* so recovered against him, there to remain until he should be legally discharged,* "as [513 by the said commitment more fully and at large appears;" by virtue of which commitment, the defendant, then and still being the warden of the said prison, received and had *Schrader* in his custody in the said prison, in execution for the said sum mentioned in the said commitment, at the suit of the plaintiff, and there kept and detained him in his custody in execution for the said sum until the defendant, not regarding the duty of his said office of warden of the said prison, afterwards, to wit, on the 1st of *August*, 1816, without the leave or license of the plaintiff, and against his will, suffered and permitted *Schrader* to escape and go at large from and out of the said prison and the custody of the defendant, then and still being warden of the said prison, the plaintiff then and still being wholly unpaid and unsatisfied his said damages and every part thereof, by reason of which, &c. To this bill the defendant demurred specially, and assigned for cause, *inter alia*, that it was not stated or alleged in or by the bill that the said supposed commitment therein mentioned was of record, or that the same was recorded; and that the plaintiff had not, in the bill, referred to any record of the said commitment, or offered to verify the same by any record thereof. Joinder in demurrer by the plaintiff.

The case was argued on a former day, by

Blosset, Serjt., for the plaintiff. The re-commitment in execution was matter of record, *Unwin v. Kirchoffe*, 2 Str. 1215, *Fotterel v. Philby*, 3 Burr. 1841.; and ought to have been pleaded with a *prout patet per recordum*.† The case of *Waites v. Briggs*,‡ which may at first view appear to shake *this [514 doctrine, was decided on general demurrer; and in *Morse v. James*, 3 Willes, 127, *Willes*, C. J., contradicts the possibility of its having been stated by *Holt*, C. J., (as reported in *Waites v. Briggs*) that in an action of debt, the judgment is only inducement, and that, therefore, the plaintiff need not conclude *prout patet per recordum*. Moreover, *Chambre*, C. J., in *Turner v. Eyles*, 3 B. & P. 456, observes that though in that case the commitment were matter

† 1 *Lev.* 211. S. C. 2 *Kehle*, 206. 1 *Sid.* 330.

‡ 1 *Ld. Raym.* 35. 2 *Salk.* 565 5 *Mod.* 8.

of inducement, it could not be said to be immaterial, for it was as much the foundation of the action, as the case of escape itself. But here, the want of the averment is particularly assigned, and the omission is a good cause of special demurrer, stat. 4 Ann, c. 16, *Wightman v. Mullens*, 2 Str. 1226. In the last cited case, as well as in *Turner v. Eyles*, which is also in favor of the defendant, the commitments were made by a single judge. In the present case, the re-commitment was a commitment by the court in execution, and, by the practice, must be filed of record. In *Wigley v. Jones*, 5 East. 440, the commitment was on mesne process, which, by the practice of the Court of King's Bench, is not matter of record; and in that case *Ellenborough, C. J.*, recognised the case of *Turner v. Eyles*, noting the distinction, that in the latter case the commitment was on a writ of *habeas corpus*, where the party had been taken in execution and escaped.

Copley, contra, was stopped by the court

GIBBS, C. J. The allegation in the bill is, that the prisoner was brought to the bar of this court by virtue of a writ of *habeas corpus*, directed to the defendant; and that thereupon the prisoner, at the request of the plaintiff, was, by the same court, re-committed to the prison in execution, "as by the said commitment," that "is, by the re-commitment of this court, "more fully and a" *515] large appears." Now, the commitment of this court must of necessity be of record; for in such a case the court can only act by record. That it is not necessary to state that the commitment was of record, appears from the case of *Turner v. Eyles*. There the averment was, "as by the said writ of *habeas corpus*, and the said commitment thereon, now remaining in the said court, more fully appears." We think it is here sufficiently averred that the commitment is of record, and that the judgment must, therefore, be for the plaintiff.

Judgment for the plaintiff.

On a subsequent day,

Blosset, Serjt., pointed out the clear distinction between this case and that of *Turner v. Eyles*, viz., here the omission of the averment was stated on special demurrer; there the objection arose after verdict; and he prayed the court to grant another argument.

GIBBS, C. J. It is almost ridiculous to order a new argument on this point; but, if the plaintiff thinks that there is any weight in the objection, and that it is worth his while to amend, we will give him leave; otherwise we will have a short argument on this point only. We certainly took it upon that case of *Turner v. Eyles*; and the distinction was not adverted to. And now,

Copley moved to amend the bill on payment of costs, and was opposed by

Blosset, on the ground that one amendment had been already allowed in the last term; and he cited *Kinder v. Paris*, 2 H. Bl. 561. But,

*516] * The court, under the particular circumstances of the case, allowed the amendment, on payment of costs up to the time of argument.

SOLLY et al. v. FORBES and ELLERMAN.

[2 Moore 567. S. C.]

The court will not interfere to relieve an outlaw in a summary way, unless he appears, or will forward the plaintiff's suit. Therefore, where a writ of *capias ad respondendum*, with an *ac etiam* on promises, was sued out by the plaintiffs against A., resident, and B., a foreigner, not resident in this country, whereupon A. was arrested, and put in bail, and an original *quare clausum fregit*, (throughout which the singular pronoun was used instead of the plural,) giving B. no addition, and without an *ac etiam*, was sued out by the plaintiffs against A. and B., followed by writs of *alias*, *pluries*, *exigent*, and *proclamation*, all properly worded, and containing clauses of *ac etiam*. and a *supersedeas* was sued out against B., who was thereupon outlawed; the court refused, on motion by B., to reverse or set aside the outlawry for irregularity, but left him to his writ of error.

THE defendant *Forbes* was arrested, at the suit of the plaintiffs, on or about the 22d of March, 1817, on the usual writ of *capias ad respondendum*, with an *ac etiam*, on a plea of trespass on the case, on promises, to the damage of the plaintiffs of 8000*l.*, issuing out of this court against both the defendants, returnable in fifteen days of *Easter*, 1817, and indorsed to hold to bail for 2000*l.* At the return of the writ, *Forbes* put in bail above to the action. The defendant, *Ellerman*, not being in *England*, the plaintiffs, after the return of the writ, sued out an original writ of trespass, *quare clausum fregit*, against both the defendants, tested on the 23d of *January*, 57 G. 3, returnable on the last day in *Hilary* term, 1817. The writ on which *Forbes* was arrested and put in bail was tested on the *quarto die post* after the original. Writs of *alias capias* and *pluries capias ad respondendum*, with an *ac etiam* in a plea of trespass on the case on promises to the damage of the plaintiffs of 8000*l.* were afterwards issued against both the defendants, and were respectively indorsed to *hold [517 them to bail for 2000*l.*, founded upon the original trespass *quare clausum fregit*; but no other original writ had been sued out or issued against them in this cause, except the said original. Writs of *exigent* and *proclamation* were, after the return of the writs of *capias alias capias*, and *pluries capias*, issued against both the defendants; upon which writs of original *quare clausum fregit*, &c., with a writ of *supersedeas*, *Ellerman* had been outlawed. The writs of *exigent* and *proclamation* were indorsed, to hold both the defendants to bail for 2000*l.*; and contained a clause of *ac etiam*, that the defendants might answer to the plaintiffs, according to the custom of the court, in a plea of trespass on the case, on promises, to the damage of the plaintiffs of 8000*l.* The original writ of trespass, *quare clausum fregit*, after commencing in the usual way, ran thus: "If *Samuel Solly* and *Hollis Solly* shall give you security to prosecute his suit, then put by sureties and safe pledges, *John Murray Forbes* and *Abraham Frederic Daniel Ellerman*, that he be before our justices at *Westminster* in eight days," &c., &c., "to show cause why, with force and arms, &c., he broke the close of the said *Samuel* and *Hollis*, and did him other wrongs, to the great damage of the said *Samuel* and *Hollis*." *Ellerman* was an alien, and a native of *Germany*, and, long before and since the action, was absent from *England*, and had no place of residence here.

Copley, Serjt., on a former day, had obtained a rule *nisi* to reverse the outlawry, or set it aside for irregularity, when he stated four grounds for his application. First, the absence of an original to warrant the outlawry; secondly, the variance between the original and the subsequent writs; thirdly, the absence of any addition to *Ellerman* in the original; fourthly, his absence from the country, and not having had a residence *therein, so that the process [518 could never have been meant to apply to him.

Bosanquet, Serjt., now showed cause against the rule. The only object of this motion is to assist the defendant *Forbes*, who has already failed in an

attempt made in his name, to set aside the outlawry. The objections are grounds for a writ of error, when the absentee must put in bail and enter an appearance. *Matthews v. Erbo*, 1 Ld. Raym. 349, *Havelock v. Geddes*, 12 East, 622. In *Hesse v. Wood*, 4 Taunt. 691, and *Garland v. Noble*, 1 B. Moore, 187, the court reversed the outlawry on motion, but this was done upon the same terms to which the party would have been entitled, if he had sued out his writ of error. In this case no appearance is entered, and every step is taken to delay and defeat the plaintiff's remedy. It is, therefore, no case for the indulgence of the court, and the defendant must be left to his writ of error.

Blosset, Serjt., (for *Copley*.) in support of the rule. The cases cited are inapplicable; for the foundation of the application to the court in this case is, that the proceedings are irregular, and the process is altogether void. Whether the party proceed to outlawry by original writ of *quare clausum fregit*, or by special original, the subsequent writs must not vary from the original. But here the original writ has no *ac etiam* clause, while all the subsequent writs contain such a clause. In *Gent v. Abbott*, Ante, 304, the *capias* contained a clause of *ac etiam* in debt. The stat. 19 Hen. 7. c. 9, gives the proceeding to outlawry, by original *capias*, in actions on the case, but that writ contains no *ac etiam* clause. There is also a *still further variance between the subsequent *519] writs and the original; which last, as far as its solecisms render it intelligible, summons *J. M. Forbes*, and *A. F. D. Ellerman*, that *he* be before the justices to show cause why *he* broke the close of the plaintiffs; while in the subsequent writs the pronoun "they" and the plural number are properly introduced. [*Burrough*, J. All this objection to the process is matter of error. I remember Lord *Erskine*, when at the bar, applied, in the case of *Harris v. Lady Napier*, for the summary interference of the Court of King's Bench in behalf of the defendant, who had been served with a common process, on the ground that his client was a peeress. But the court refused to interfere summarily, and left the defendant to her writ of error.] By 1 Hen. 5. c. 5., it is enacted, that "in originals, whatever *exigents* shall be awarded, the addition of the defendants' names must be put." Here, none of the writs give the defendant *Ellerman*, any addition. Neither the stat. Hen. 5., nor the writ of *proclamation* required by stat. 13 Eliz. c. 3. s. 1. can be held to apply to foreigners. In *Bacon's Abridgment*,† where the rules for the reversal of outlawries are laid down, it is said, that where the process is defective, the party shall not be condemned. In *Reilley v. O'Connor*, Barnes, 325, the outlawry commenced and completed during the defendant's residence in *Ireland*, was ordered to be reversed at his expense, without bail or appearance. Where the court see an unlawful proceeding, they will not put the party to the expense of a writ of error, but will avoid circuitry, and relieve him in a summary way.

Bosanquet, who rose to reply upon the cases cited, was stopped by the court. *520] *GIBBS, C. J. If my brother *Blosset*, could support the doctrine, that there is no process by which plaintiffs can proceed to outlawry against persons who never have been in this country, it would be a receipt by which fraudulent persons residing here might successfully cheat every creditor; for they would have nothing to do but to enter into a partnership with a foreigner, never resident here. In some of the older cases, the convenience of the suitor has not been so much considered by the court as in the later cases; not that the court can alter the law, but that now, if there are two courses which the party might pursue, they will not grant the outlaw that which emanates from the indulgence of the court, unless he will forward the plaintiff's action. It is a rule, that the outlaw shall not be heard without appearing: but it is urged, that, if the process is irregular, the irregularity forms an exception to the rule, and the court may then interpose in a summary way. Taking this proposition for granted, the court will, on such an occasion, pause, to see what the justice

of the case requires. Here is an action against two defendants; one of them not being within the range of the process of the court, the plaintiff cannot proceed without outlawry against the latter. He does so proceed; and, after every possible technical objection has been raised by the defendant *Forbes*, the other defendant *Ellerman*, the foreigner, is now made to apply to the court for the reversal of the outlawry. But, be it remembered, that not one of the numerous objections which he has raised, will be less available on a writ of error, than they would be in this court. Since, then, the object of the outlawry is to compel the defendant to appear, and contest that which the plaintiff contends is a just debt, we will not relieve that defendant, but leave him to his writ of error, on which he will *be entitled to every available remedy which he now [*521 seeks.

PARK, J. I am of the same opinion. The same point has been decided in the Court of King's Bench, in a case of which I have a note.

BURROUGH, J. It appears to me that *Ellerman*, is not in court to make any motion at all.

Rule discharged.†

† *Dallas, J.*, was absent.

WILSON v. WELLER, et al.

[2 Moore 574. S. C.]

Distress under a magistrate's warrant to levy a sum ordered by him under the statute of laborers, 20 G. 2. c. 19. The plaintiff replevied, and removed his replevin by writ of *re. fa. lo.* into this court. The court discharged a rule *nisi* to set it aside, obtained on the ground that the sixth section of the statute provided that no *certiorari* or other process should remove proceedings under that act into any court at *Westminster*; holding, that the replevin was a collateral proceeding, and not within that section.

CROSWELLER, a laborer employed by the plaintiff, applied to a magistrate for an order for the sum of 3*l.* 4*s.* for wages due. The magistrate summoned the plaintiff to show cause, who appeared; and the magistrate, under stat. 20 G. 2. c. 19., made his order in writing for the same. Upon demand of the sum ordered and refusal by the plaintiff, the magistrate issued his warrant of distress. The plaintiff replevied, and removed his replevin by writ of *recordari facias loquelam* into this court.

Pell, Serjt., on the second of *June*, moved to set aside the writ, and to have the proceedings stayed, on the ground *that the sixth section of the statute provided that no *certiorari* or other process should remove proceedings under that act into any court at *Westminster*; and he commented on the mischief which would ensue, if every magistrate's order for a laborer's wages were liable to be followed by a replevin suit. [*522

The court, consisting of *Dallas, Park*, and *Burrough*, Justices, showed no disposition to entertain the motion; and *Burrough, J.*, observed, that the sixth section of the statute did not take away the writ of *recordari facias loquelam* on replevin, which was a mere collateral proceeding, but only the motion of the magistrate's order. They, however, gave *Pell*, leave to mention the case again; and, on a subsequent day, when he referred to the case of *Lowther v. The Earl of Radnor*, 8 East, 113, the court granted the rule. And now,

Vaughan, Serjt., showed cause on an affidavit, which stated, that *Crosweller*, was a master carpenter, and that the bill was not only for work done, but mate-

rials found. He urged that such a case was not within the statute; and that, if it were, every action for work and labor, and materials found, might be tried before a magistrate. But, granting it to be within the statute, he contended that the writ in this case was a mere collateral proceeding, and could not be brought within the prohibitions of the sixth section.

The court called on *Pell*, who contended that the case was within the statute, and that the provisions of the sixth section were such as to call on the court to interfere to quash proceedings which, he argued, were in that section prohibited.

*523] *PARK, J.† Whether this case be or be not within the jurisdiction of a magistrate, under the 20 G. 2. c. 19., it is not necessary now to decide. It is sufficient for me to say, that I do not think that the proceeding sought to be set aside is a proceeding within the sixth section of the act, so as to call upon the court to interfere to quash it.

BURROUGH, J. I do not think that this is a case in which the statute requires us to interfere. The action of replevin is a proceeding totally collateral. This writ of *recordari facias loquelam* does not remove any of the proceedings before the magistrate: they all remain where they were. If this claim was not a proper subject for the magistrate's jurisdiction, it is a matter to be pleaded to the replevin.

Rule discharged with costs.‡

† *Gibbs*, C. J., and *Dallas*, J., were absent, the former having left the court, the latter being ill.

‡ See 1 *Brod. & Bing.* 57.



MEMORANDUM.

On the last day of this term *William Taddy*, of the *Inner Temple*, Esquire, was called to the degree of the Coif, and gave rings with the motto *Mos et lex*.

END OF TRINITY TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS
AND
OTHER COURTS,
IN
MICHAELMAS TERM,
IN THE
FIFTY-NINTH YEAR OF THE REIGN OF GEORGE III, 1818.

MEMORANDA.

In the course of this vacation, The Right Honorable *Edward* Lord *Ellenborough* resigned the office of Chief Justice of the Court of King's Bench, in which he had presided since *April*, 1802. His lordship died on the 13th day of *December*, 1818.

In the same vacation, Sir *Charles Abbott*, knight, one of the judges of the same court, was appointed to the office of Lord Chief Justice of the Court of King's Bench, vacant by the resignation of Lord *Ellenborough*.

In the preceding vacation, the Right Honorable Sir *Vicary Gibbs*, knight, also resigned the office of Chief Justice of this court, in which he had presided since the 24th of *February*, 1814.

*In the same vacation, Sir *Robert Dallas*, knight, one of the Judges of this court, was appointed to the office of Chief Justice of this court, [*526 vacant by the resignation of the Right Honorable Sir *Vicary Gibbs*, knight.

On the first day of this term, the following gentlemen took their places within the bar, as his majesty's counsel, learned in the law.

Archibald Cullen, of the *Middle Temple*, Esq.

Willim Owen, of *Lincoln's Inn*, Esq.

William Wingfield, of *Lincoln's Inn*, Esq.

William Horne, of *Lincoln's Inn*, Esq.

George Heald, of *Gray's Inn*, Esq.

SYMONDS v. MILLS.

If upon a reference of actions in this court, and award of a sum to be paid by each party, the party entitled to the larger sum sues in the Court of K. B., in order to make the defendant's set-off subject to the lien of his attorney for his costs, this court will not interfere to enforce the set-off, nor will they order the award to be delivered up.

UPON a reference of many causes in this court between the parties, the arbitrator awarded payment on the one side, of 181*l.* 1*s.* 6*d.*, and on the other side, of 140*l.* 8*s.* The plaintiff, who by the award was entitled to receive the larger sum, had brought an action for it in the Court of King's Bench. Whereupon

Best, Serjt., for the defendant, moved in this court, that the sum of 140*l.* 8*s.* might be set-off against the sum of 181*l.* 1*s.* 6*d.*; and that on payment of the sum of 40*l.* 13*s.* 6*d.*, being the difference, the award might be delivered up to be cancelled; he suggested that the plaintiff's motive for suing in the King's *527] Bench, was a hope that defendant would move that the proceedings there should be stayed; well knowing, that according to the practice of that court, the attorney's lien must be satisfied anterior to the set-off, whereas here, the claims of the parties are paramount to the attorney's lien.

The court, after inquiring whether there was any precedent for their ordering an award to be delivered up to be cancelled, and upon *Best* admitting that he had no instances of such a practice, unanimously held, that it was impossible to grant the rule.

Best took nothing by his motion.



STEAD et al., assignees of MOORHOUSE, v. GASCOIGNE.

If a sheriff legally take goods in execution, the proprietor whereof afterwards becomes a bankrupt, and the sheriff sells at one time, after the bankruptcy, enough to satisfy both that execution and also another execution, which being delivered to him after the bankruptcy, is void, the bankrupt's assignees may recover in trover for such of the goods as were sold after the sheriff had raised money enough to satisfy the first execution.

THIS was an action of trover brought by the assignees of *Moorhouse*, a bankrupt, against the defendant, who was sheriff of *York*, for the value of certain goods which he had taken in execution and sold. At the trial of this cause at the *York Summer assizes*, 1818, before *Wood*, B., it appeared that an execution had issued at the suit of *Jarrett*, against the goods of *Moorhouse* for 174*l.*, under which the defendant, on the 6th of *July*, made a seizure. An act of bankruptcy was committed by *Moorhouse* on the 18th of *July*; and on the 29th of *July*, another execution at the suit of *Ramsbottom*, was delivered to the sheriff.

*528] The sheriff, who had for some time delayed to sell at the bankrupt's request, sold goods on the 12th of *August* to the amount of both executions. It was objected for the defendant, that as he had made one entire seizure, and one entire sale, which was at all events good for so much as was requisite to satisfy *Jarrett's* execution, the action was misconceived, and that the assignees could not maintain trover, but ought to have brought their action for money had and received, to recover the surplus of the money produced by the sale after therout satisfying *Jarrett's* execution. The jury, however, under the direction of *Wood*, B., found a verdict for the plaintiffs.

Lens, Serjt., now moved that the verdict might be set aside, and a new trial had, on the ground that there had been no illegal conversion by the sheriff.

The sale took place after an execution, under which the sheriff had authority to act, and the proper remedy in such a case, is an action for money had and received. The sale of goods of greater value than was sufficient to satisfy the first execution, was not a tortious conversion, the sheriff having a competent authority to sell: he may have done wrong; but the plaintiffs have by this action resorted to the wrong remedy.

DALLAS, C. J. A sheriff has no right to sell more than is necessary: the defendant in this case has, in my opinion, committed a tortious act; and trover is the proper action.

PARK, J. and BURROUGH, J. concurred

Rule refused.

*THORNTON et al. v. SHERRATT.

[*529]

A condition in a deed of composition, that a publican shall continue to deal for twelve years with his creditors in the articles of their respective trades, may be valid. But it is qualified by the implied condition, that their articles shall be good and marketable. Contracts by which brewers bind publicans to deal with them are not to be favored, as tending to prejudice the health of the subject.

THIS was an action on a promissory note of the defendant for 300*l*. Upon the trial of the cause at the sittings after *Trinity* term, 1818, at *Guildhall*, the defence was a release, and it appeared that the defendant, who was a publican, had given the note in question as a security for money lent to him by *Thornton*, *Hoare*, and others, who were brewers; and that the defendant having become embarrassed, had proposed to his creditors to compound with them by paying twelve shillings in the pound on the amount of his debts, but that the plaintiffs insisted on inserting in the deed a condition that the release should be effectual only in case the defendant should continue to deal with his several creditors in the articles of their respective trades, during the residue of his term in the public house which he then occupied, and wherein he then had twelve years unexpired, to which condition the defendant had agreed.

The defendant sold his lease, and entered on another public house: he proved that he had dealt with the plaintiffs for a time, but that he had frequently expostulated with them on the quality of the beer with which they furnished him, and had frequently sent it back to be exchanged for other beer, in consequence of his customers disapproving of it, sometimes because it was stale, sometimes because it was not bright. He at length ceased to deal with the plaintiffs, whereon they sued him for the residue of the money due on the promissory note, having already received their twelve shillings in the pound on the amount thereof.

The plaintiffs gave evidence, that the beer sent to the defendant was taken from the same butt from which other public houses were supplied; [*530] and that their customers in general did not complain, though occasionally there were returns of the beer. The defendant's sale had decreased during the time of his dealing with the plaintiffs. *Dallas*, J., directed the jury, that although this was a contract of which he greatly disapproved, being for twelve years without qualification; yet, that as it was a contract which the defendant willingly entered into for his own benefit, he must perform it; and that the question for their consideration was, whether the defendant was supplied by the plaintiffs with good and saleable beer: that if he was, he was bound to take it from the plaintiffs, and was not discharged from his note. The jury found a verdict for the defendant.

Best, Serjt., now moved to set aside the verdict and have a new trial, on the ground that the balance of the evidence was in favor of the plaintiffs, the only imperfections proved in the beer, being that it was sometimes stale, whereas the proper degree of staleness was merely a matter of taste, and sometimes thick, which was no real defect in the quality of the beer, and only affected its appearance to the eye. It was incumbent on the defendant to have shown, if the fact had been so, that the beer was not marketable.

DALLAS, C. J. Although at the trial I expressed an opinion in favor of the plaintiffs, yet the whole transaction was one of which I could not approve, for I very much disapprove of these covenants by which the brewer gets the publican into his power; and more especially, in a case like the present, where the plaintiffs have drawn in the defendant to take all his beer from them for so long a period as twelve years. I held it incumbent on the plaintiffs to show, that *531] the beer delivered *by them was good marketable beer. It was proved by the plaintiffs, that this was such beer as they usually supplied, and that it was good; but then they admitted frequent complaints and frequent returns of it; and two witnesses for the defendant proved repeated complaints, and that the customers of the defendant often returned the beer sent to them. The whole case was a question for the jury, and they have decided it. In a similar case, Lord *Ellenborough*, C. J., strongly reprobated the conduct of a brewery which I shall not name.

BURROUGH, J. I think that there was very good ground for the verdict. It is admitted that the beer was not bright, and unless beer is bright it is seldom well tasted, and therefore, this was not good marketable beer. These contracts are very prejudicial to the health of the subject. It is not a case in which the court will interfere.

PARK, J., concurring, the court

Refused the rule.



*532]

*LEYTON v. SNEYD.

2 Moore 583. S. C.]

The declaration stated that the defendant undertook that he would procure his co-trustee to join with him in transferring or causing to be transferred, and that the defendant and his co-trustee should accordingly transfer certain stock, standing in their joint names, and breach. The proof in support of the declaration was, that the defendant directed his bankers to sell the stock, who accordingly sold the same, by their broker, to the plaintiff for time, and informed the defendant thereof in a letter, enclosing the power of attorney; that the defendant, by letter, acknowledged the receipt of it, and wrote that he had signed the power, and had forwarded it immediately to his co-trustee; that the stock not being transferred at the day appointed, the defendant in subsequent letters to his bankers, treated the loss as one which must be borne either by himself, or the *cestui que trust*, and acquitted the bankers of doing wrong in making the sale. The plaintiff was nonsuited: Held, that the contract was a mere conditional contract by the defendant to concur with his co-trustee in the sale, and that the nonsuit was well directed.

ASSUMPSIT. The first count of the declaration stated, that the defendant and *Henry Guest*, at the time, &c., were possessed of a share of stock called the *three per cent.* consolidated bank annuities, to the amount of 10,786*l.* 2*s.* 3*d.*, of the capital of that stock, then standing in their names in the books of the governor and company of the bank of *England*, and of the value of 7000*l.*: and being so possessed, in consideration that the plaintiff, at the request of the defendant, would agree to purchase from him and *Guest* a part of the share of

the said stock therein mentioned, at a rate therein stated, for every 100*l.* of the said stock to be transferred in the said books to the plaintiff, on a day in the declaration named, the defendant undertook that he would procure *Guest* to join with him in transferring or causing to be transferred, and that *Guest* and the defendant should accordingly transfer or cause to be transferred in the said books to the plaintiff on the said day such part of the said share of the said stock. The plaintiff then averred, that he relying, &c., agreed with the defendant to purchase of him and *Guest*, and to pay them at the rate aforesaid for the said part of the said share of the said stock; and that though he was ready and willing to accept a transfer of such part of the said share, &c., yet *that the defendant did not, nor would procure when he was requested so to do, nor had procured *Guest* to join the defendant in transferring or causing to be transferred, nor had they transferred or caused to be transferred to the plaintiff in the said books, &c., whereby, &c. Another set of counts stated that the defendant undertook that he would deliver or cause to be delivered to the plaintiff a power of attorney, duly executed by *Guest* and the defendant, to authorise the transfer: another set of counts stated an undertaking by the defendant for the delivery of such powers to the plaintiff's bankers, and the money counts were added. Plea, *non assumptit*. [533]

The following facts were given in evidence at the trial before *Park, J.*, at the *London* sittings after the last term. The defendant was co-trustee with *Guest* under a marriage settlement, and had directed his bankers to effect the sale of 3030*l.* 6*s.* stock, standing in the names of *Guest* and himself, in the three *per cents.*, which they accordingly did on the 22*d* of *February*, 1817, through *Brown*, their own broker, to the plaintiff in this action, who was also a broker, for the 11*th* of *March* following, and they sent the account down to the defendant, in a letter, dated the 25*th* of *February*, 1817, enclosing the power of attorney for execution. On the 3*d* of *March* following, the defendant wrote in answer: "The power of attorney you sent me, I signed, and forwarded immediately to my co-trustee, Mr. *Guest*." In the power of attorney sent, *Guest*'s name was mis-spelled, and another power of attorney properly spelled and executed, was sent to other bankers, who sold out a similar quantity of stock, standing in the name of *Guest* and the defendant, to another purchaser. In the mean time the price of the stock rose, and the bankers were called on by the plaintiff on the settling day to make good the deficiency. On the 31*st* of *March*, the defendant, in answer to a letter from the bankers to him, stating the situation in *which his orders had placed them, recognised his former order, and lamented that he had been induced to sign the power of attorney sent to the other bankers; and on the 8*th* of *March*, in a letter to his bankers, he treated the loss as one which must be borne either by himself or the husband of the party for whom he was a trustee; and stated that it could not be supposed by any of the parties that the bankers had acted wrong. *Park, J.*, did not think that the plaintiff could recover on this evidence, and directed a nonsuit. [534]

Bosanquet Serjt., now moved to set aside the nonsuit and have a new trial. If the plaintiff had stood on the ground that one co-proprietor of stock can bind his companion as a partner can, he would have sued both *Guest* and the defendant: but he sues on the defendants contract that he would cause his co-trustee to transfer. The defendant gave the order to his bankers to sell; they did sell, and the plaintiff contracted to purchase it; and it is clear law, that if one assume an authority for another which he has not, an action lies against him on that contract. *East India Company v. Hensley*, 1 Esp. N. P. C. 111. If *A.* assume to sell stock, standing in the names of twenty who have given him no authority, he will be liable on his contract. The only question then is, whether the plaintiff has made out his case, that the defendant did assume such authority. That the defendant did assume this authority is clear, from his order to his bankers, and his subsequent recognitions by the letters of *Murch* and

April, in the latter of which he acknowledges his liability, and acquits his bankers of doing wrong in obeying his orders. The stock was sold before the power was executed, and for the return of the power; and this was with the *535] knowledge of the defendant. *His contract, therefore, was the contract that *Guest* should transfer this stock.

DALLAS, C. J. You say, brother *Bosunquet*, that this was evidence to go to a jury, that the defendant contracted with the plaintiff that *Guest* should transfer the stock in question. Now it seems to me to be evidence of a mere conditional contract on the part of the defendant, to concur with the other trustee in the sale.

PARK, J., of the same opinion.

BURROUGH, J. I cannot discover any evidence to show that the defendant ever made an absolute bargain, or that he agreed to procure *Guest* to make the transfer. The bargain appears to me to be wholly conditional; nor is there any evidence that it was ever contemplated, but that the transfer was to be the joint act of the defendant and his co-trustee.

Rule refused.

BORRADAILE et al., v. BRUNTON et al.

[2 Moore 582. S. C.]

1. Under an averment that one of the links of a warranted chain cable broke, and that thereby the chain cable and an anchor to which it was attached were wholly lost, it is sufficient to prove that a link of the chain cable being broken, the pilot, for the preservation of the ship and crew, slipped the cable, and that the anchor and chain cable were thereby lost.
2. Held, also, that under the warranty of the cable, the plaintiffs might, in addition to the value of the cable, recover the value of the lost anchor, to which the insufficient cable was attached.

THE plaintiffs declared, that, in consideration that they, at the defendants' request, had bought of the defendants, and the defendants had sold and delivered *536] to the plaintiffs a chain cable, as a substitute for a rope cable of sixteen inches, for the use of the plaintiffs' ship *Indus*, the defendants warranted that the chain cable should last two years; that the plaintiffs used the chain cable from time to time until it broke; and that, in breach of the warranty, the chain cable did not last two years, as a substitute for a rope cable of sixteen inches, but on the contrary, that within the two years, and while the plaintiffs' ship was held by the chain cable, one of the links thereof broke, and thereby the chain cable and an anchor of the plaintiffs, to which the chain cable was affixed, were wholly lost to the plaintiffs. The defendants pleaded the general issue. Upon the trial of the cause, before *Park, J.*, at *Guildhall*, at the sittings after last *Trinity* term, it was proved, that while the ship was riding at anchor at the mouth of the *Ganges*, in a dangerous position, between two reefs of rocks, one of the links of the chain cable was discovered to have separated, and that the pilot, being unable to get in the part of the cable in which the broken link was situate, deemed it necessary, for the preservation of the ship and crew, to slip the cable and run to sea, which was accordingly done, and that both the cable and anchor were thereby lost. The cable in question was warranted for two years, as a substitute for a rope cable of sixteen inches. The jury found a verdict for the plaintiffs for 358*l.* 1*s.* 8*d.*, being the value, as well of the lost anchor as of the cable.

Lens, Serjt., now moved, either to set aside the verdict and have a new trial,
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or to reduce the verdict by deducting therefrom, the value of the anchor. He founded his claim to the first part of his application upon the ground of a variance between the evidence and the averment that the loss of the anchor was occasioned by the breaking of the cable; for the evidence was, that *the loss was not an immediate consequence of the breaking of the chain [*537 cable, but that the pilot and master, in their alarm, respecting its supposed state, slipped the cable, and ran to sea, whereby he contended, it appeared that it was not by the breaking of the cable that the anchor was lost. The plaintiffs, he contended, might have recovered for this loss if they had averred it in another manner, but that they could not recover on this averment. If the plaintiffs had averred, that by failure of the cable they were obliged to slip and run to sea, the defendants would have thereby been apprised that the plaintiffs intended to try the question, whether her running to sea were a consequence of the insufficiency of the cable.

Secondly, he submitted, that the plaintiffs could not recover for the loss of the anchor as for a loss consequent on the failure of the cable; for, though the anchor followed the insufficient cable, yet this was a consequence to which the warranty did not extend, for the cable only was warranted. The principle contended for by the plaintiffs would render the defendants liable for the loss of the ship, if, on the breaking of the cable, that event had happened.

DALLAS, C. J. The defendants warrant the cable sufficient to hold the anchor, and it is proved not to be sufficient. The holding of the anchor by the cable is of the very essence of their warranty.

PARK, J. The use of a cable is to hold the anchor. Upon the breaking of the link, the cable became insufficient to hold the anchor, and the pilot then ordered it to be slipped, in the exercise of a prudent discretion, to save both ship and cargo.

The court refused the application on both grounds.



DOE, on demise of HOLMES, v. DARBY, Clerk.

[*538]

[2 Moore 581. S. C.]

After verdict in ejectment against a tenant for not quitting pursuant to notice, a subsequent distress by the landlord for rent due after the verdict, does not waive the notice to quit. Nor is it any ground for setting aside the verdict, or staying execution.

THE defendant not having quitted at *Lady-day*, 1818, (in pursuance of half a year's notice given to him,) a farm which he had held as tenant to the lessor of the plaintiff, the latter brought an ejectment, and, at the *Summer* assizes, 1818, obtained a verdict for the premises. In the *October*, next after the verdict, the lessor of the plaintiff distrained for rent due at *Michaelmas*, 1818, and the defendant paid the rent and the costs of the distress.

Blossel, Serjt., now moved to arrest the judgment, and stay the execution of the writ of possession, contending, that by the distress the lessor had waived the notice to quit and the verdict, and had recognised a continuing tenancy; and that it was competent for the defendant to avail himself of any benefit arising to himself from the distress.

DALLAS, C. J. The distress is subsequent to the notice, and to the verdict, and the defendant might have disputed the right to distrain. He is not without remedy: if this is a complete waiver, let him bring his ejectment, but there is no ground to set aside the verdict.

BURROUGH, J. Since there is a verdict, there can be no waiver of the notice to quit; the verdict having established the fact that no tenancy subsisted, the defendant might have disputed the subsequent distress. If the distress creates *539] a new tenure, the defendant may bring his ejectment; but we see no ground to destroy the effect of this verdict. The defendant has artfully paid the rent, and submitted to the distress for the sake of raising this question. Rule refused.

HARRIS v. COOK.

[2 Moore 567. S. C.]

Where, in an action on the case for an excessive distress, the premises were averred to be in the parish of *St George the Martyr, Bloomsbury*; and the proof was, that the premises were in the parish of *St. George, Bloomsbury*, the variance was held to be fatal.

THIS was an action upon the case for taking an excessive distress on premises averred to be in the parish of *St. George the Martyr, Bloomsbury*. Upon the trial of this cause at *Westminster*, at the sittings after *Trinity* term, 1818, before *Park, J. Bosanquet, Serjt.*, for the defendant, elicited the fact that the premises were in the parish of *St. George, Bloomsbury*, not of *St. George the Martyr*, and that they were two different parishes, which in common parlance bore these names; and this he objected was a fatal variance, whereupon *Park, J.*, nonsuited the plaintiff.

Lens, Serjt., now moved to set aside the nonsuit, and have a new trial, upon the ground that the parish was rightly named in the declaration, for that there was but one *Saint* in the *English* calendar named *George*, and that he was *Saint George the Martyr*; therefore, though there were several parish churches dedicated to *Saint George*, yet all churches bearing that name, wherever situate, were dedicated to *St. George the Martyr*.

DALLAS, C. J. Parishes which derive their names from tutelar saints must, in pleading, be distinguished by the vulgar appellations or additions of those saints.

*540] *PARK, J.* It is well known that the church of *St. George, Bloomsbury*, was so named in honor of *King George*, the First, in whose reign it was built.

BURROUGH, J. The court cannot know whether there be not more than one *Saint George*.

Rule refused.

LEIGH v. PATERSON.

[2 Moore 588. S. C.]

If a vendor has time until a given day to deliver goods, and on a prior day, when the prices are low, he refuses to proceed with the contract, after which the price rises, the purchaser, not rescinding, is entitled to recover the difference between the contract price and the higher price which the goods bear on the last day appointed for the fulfilment of the contract.

THIS was an action brought to recover damages sustained by the plaintiff, by reason of the non-performance by the defendant, of a contract which he had

entered into for furnishing to the plaintiff a certain quantity of tallow, to be delivered *in all December*, at 65*s. per cwt.* The defendant suffered judgment to pass by default; and upon the execution of the writ of enquiry before the sheriffs of *London*, it was proved, that on the 1st of *October*, the defendant apprised the plaintiff that the goods were sold to another, and that he would not execute the contract. The market price of tallow on that day was 71*s. per cwt.*, but on the 31st of *December*, the price was 81*s. per cwt.*; and the plaintiff insisted, that he was entitled to the difference between 65*s.* and 81*s.*, the price of the last day, which the defendant had for performance of his contract: but the under-sheriff (conceiving, that if the plaintiff did not acquiesce in the defendant's renunciation of the contract, he might on the day when he was apprised of it, have gone into the market and supplied himself with the requisite quantity of tallow at 71*s.*) held, that the plaintiff, therefore, was entitled to recover no more than the difference between 65*s.* and 71*s.*; and the [*541] jury found their verdict in conformity to that direction.

Vaughan, Serjt., had, on a former day, obtained a rule *nisi* to set aside this verdict, and execute a new writ of enquiry; against which,

Lens, Serjt., now showed cause, contending, that after the defendant had peremptorily renounced his engagement, and sold the goods to another, the plaintiff being under no uncertainty about it, ought not to be allowed to extend his loss beyond that amount, which was then ascertained by the unequivocal declaration of the defendant.

DALLAS, C. J. The contract being mutually made, could only be dissolved by the consent of both parties; it could not be dissolved by the one without the consent of the other. The defendant had a right to deliver the tallow at any time before twelve at night on the 31st of *December*; he had all that month to deliver it in, and the plaintiff was bound to receive the tallow at any moment until after the 31st. It is said, that he might have bought other tallow in the market: the answer is, he was not bound to do so; but further, the defendant might have bought other tallow in the market on the 1st of *October*, or any subsequent day, and have delivered it if he would. The price, therefore, which is to regulate the plaintiff's damages, is the price on the 31st of *December*.

PARK, J. For any thing that appears, the plaintiff never assented to recind the contract; and the defendant might have delivered the tallow at any moment up to the 31st of *December*, and the price on that day should have regulated the verdict of the jury.

*BURROUGH, J. The plaintiff was not bound to go into the market and buy. He never assented to rescind the contract: therefore, the [*542] direction of the under-sheriff to the jury was wrong.

Rule absolute.

GANSON v. WELLS.

A layman, lessee of the tithes of certain closes, which the rector lets by auction in separate lots every year, proves a sufficient title to enable him to recover on the stat. 2 & 3 *Ed.* 6, for not setting out the tithes, if he proves that he received payment for tithes in a former year. Per *Dallas*, C. J., at *Nisi Prius*.

THIS was an action brought by the plaintiff, who had contracted with the rector of a parish for the tithes of certain closes for one year, against the defendant, who was the occupier of the closes, for not setting out the tithes. Upon the trial of this cause before *Dallas*, C. J., at the *Norfolk Summer* assizes, 1818, it was proved that the defendant had, in a preceding year, paid a com-

position for tithes to the plaintiff; but it also appeared that the rector of the parish was in the habit of annually setting up to sale by auction, in several lots, the tithes of every separate close in his parish. For the defendant, it was objected that the plaintiff did not show a sufficient title to the tithes to enable him to recover, unless he derived it from the rector by some instrument in writing: but *Dallas, C. J.*, referring to the case of *Hartridge v. Gibbs*,† held that it was sufficient proof of title, that the defendant had paid the plaintiff a composition for tithe in a preceding year.

After verdict for the plaintiff,

Copley, Serjt., now moved to set it aside, and have a new trial, upon the ground, (amongst others,) that inasmuch as the rector was proved to have *543] annually let the *tithes of the several closes in his parish to a new tenant, and no evidence of the demise to the plaintiff in the year in question was produced, the fact of payment of a composition to the plaintiff in a former year did not prove the plaintiff's title to the tithes in the present year. The case cited is distinguishable, because there the plaintiff was, at the time of the former payment to him, in possession of the tithes of the whole parish, whence the presumption of his continuing title might well arise; but not so here, where the tithes were divided into small portions, and the occupiers were continually changed.

The court, however, held, that as this point had not been made at the trial, they could now entertain it, and

Refused the rule.

† 2 *Selw. N. P.* 1250, 5th edit.

FOORD v. WILSON.

[2 Moore 592. S. C.]

The assignor of a term covenanted that he had not at any time done any act whereby the premises assigned could be incumbered; and that, notwithstanding any such act, the lease was a good and subsisting lease, and that the defendant, at the time of executing the assignment, had in himself good right to assign the premises in manner aforesaid: Held, that the covenant that the assignor had good right to assign, was qualified and restrained to his own acts only.

COVENANT. The plaintiff declared, that, by an indenture, dated the 11th of October, 1816, and made between the defendant of the one part, and the plaintiff of the other part, (after reciting, that by an indenture of lease, dated the 2d of January, 1809, made between *George Moss, Thomas Moss, and H. S. Ball*, of the one part, and the defendant of the other part, *George Moss, Thomas Moss, and H. S. Ball*, demised to *the defendant, his executors, *544] administrators, and assigns, a certain messuage, situate at *Vauxhall*, then in the possession of the defendant; to hold the same unto the defendant, his executors, administrators, and assigns, from the 24th of June, 1810, for the term of twenty-one years, at a certain yearly rent; and also reciting, that the plaintiff had contracted with the defendant for the absolute purchase of his interest in the said messuage and premises, for the residue of the said term of twenty-one years, for a certain sum of money;) it was witnessed, that the defendant, in pursuance of this contract, and in consideration of the purchase-money, did assign and set over to the plaintiff the said messuage and premises; to hold the same unto the plaintiff, his executors, administrators, and assigns, for all the

residue then unexpired of the said term of twenty-one years, subject to the payment of the rent, and the observance and performance of the covenants therein contained: and that the defendant, by the same indenture of assignment, did covenant with the plaintiff (among other things) "that he the defendant, at the time of the sealing and delivery of that indenture, had in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, assign, transfer and deliver the said messuage and premises unto the plaintiff, his executors, administrators, and assigns, in manner aforesaid, and according to the true intent and meaning of the said indenture."

The plaintiff then averred, that the defendant had not in himself, at the time of the sealing and delivery of the assignment, good right, full power, and lawful and absolute authority, to grant, bargain, sell, and assign the messuage and premises therein mentioned, and thereby assigned to the plaintiff, his executors, administrators, and assigns, according to the true intent and meaning of the indenture of assignment; but on the contrary thereof, that the defendant then had in himself good *right, full power, and lawful and absolute authority, to grant, bargain, sell, and assign a part only, to wit, three undivided [*545 fourths parts of the messuage and premises, the other fourth part thereof, at the time of the sealing and delivery of the indenture of assignment belonging to, and the legal title of and in the same, being then and from thence hitherto legally vested in *George Moss, Thomas Moss, and T. Payne*, in trust for *Charlotte*, the wife of *H. S. Ball*; and which trustees, having good and sufficient and lawful right and title to the said one-fourth part of the same messuage and premises, afterwards and during the residue of the said term of twenty-one years, to wit, on the 1st of *November*, 1816, under and by virtue of such lawful title, demanded from the plaintiff a great and increased rent for their one-fourth part of the said messuage and premises; and in default of his agreeing to pay the same for the residue of the said term of twenty-one years, had threatened to eject and remove, and had right and power to eject him from the possession and enjoyment of such one-fourth part of the said messuage and premises; and that, in order to retain the possession thereof, he had been forced to consent, and had consented to pay such increased rent for that one-fourth part of the messuage and premises, for the residue of the said term of twenty-one years, contrary to the effect of the covenant of the defendant. The defendant craved oyer of the indenture, by which it appeared, that the covenants for title with the plaintiff were, "that he (the defendant) had not, at any time theretofore, made, done, committed, or suffered any act, deed, matter, or thing whatsoever, whereby or by reason whereof the said messuage and premises, or any part thereof, were, could, should, or might be impeached, charged, incumbered, or affected, in title, estate, or otherwise howsoever; and that for and notwithstanding any such act, deed, matter, or thing, the lease *was a [*546 good and subsisting lease, valid in the law, and not forfeited, surrendered, or become void or voidable; and that the defendant, at the time of the sealing and delivering the indenture, had in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, assign, transfer, and deliver the same messuage and premises unto the plaintiff, his executors, administrators, and assigns, in manner aforesaid, and according to the true intent and meaning of the same indenture." After these covenants followed a covenant for further assurance, by the defendant, his executors, administrators, and all persons claiming under him or them.

The defendant demurred specially, and showed, for causes of demurrer, that the indenture did not contain any covenant or warranty of title to, or of right, power, or authority to bargain, sell, and assign the messuage and premises, other than against the defendant, and persons claiming under him; and that the plaintiff had not in his declaration alleged or shown any defect of title to the messuage and premises, arising from or by reason of any thing done by the defendant, or any person claiming under him, or any eviction, interruption,

molestation, or disturbance, done, committed, or occasioned by the defendant, or any persons claiming under him.

The plaintiff joined in demurrer.

Best, Serjt., in support of the demurrer. This is a qualified covenant confined to such defects in the title as arise from the acts of the covenantor, and it cannot be extended to the acts of all the world. *Browning v. Wright*, 2 B. & P. 13, is in point, and has never been shaken. **Howell v. Richards*, *547] 11 East, 633, in which the case of *Browning v. Wright*, *ibid.* 643, is recognised as sound law, was a case in which the most general terms of extension were made use of. Here *Best* was stopped by the court, who called on

Vaughan, Serjt., who thus argued for the plaintiff. The covenant that the grantor had in himself good right, full power, and authority, to grant, assign, &c., is an independent covenant; and if the words be not held to form an independent covenant, they must be expunged; for, if not so read, they have no meaning. The assignor virtually says, 'not only do I covenant against my own acts, but I further covenant, that I have full power and absolute authority to assign.' The language is that of an absolute covenant. In *Browning v. Wright* the premises were conveyed in fee: here the residue of a term is assigned. In the conveyance of a leasehold estate, where the title cannot be so easily ascertained as in the case of a freehold estate, the purchaser must require a greater security.† *Gainsford v. Griffith*, 1 Wms. Saunders, 58, and the distinction there taken between that case and that of *Broughton v. Conway*, Dyer, 240, is strong for the plaintiff; and in *Barton v. Fitzgerald*, 15 East, 530, which was the case of an assignment of a lease, the second covenant was held to be not restricted by the covenant preceding it.

DALLAS, C. J. The leading principle in these cases is to be drawn from the intention of the parties. The order in which the covenants stand, however *548] transposed,‡ is comparatively unimportant. But, in this case there is no need to seek for the intention of the defendant. He covenanted that he had not done any act whereby the premises assigned could be incumbered or affected in title, and that for and notwithstanding any such act the lease was valid, and that at the time of the sealing and delivery, he had in himself full power and lawful and absolute authority to assign the premises in manner aforesaid. Now can it be urged with the most remote hope of success, that this latter covenant is independent of those which precede it? or in other words, can it be said, that the words "and that" are not copulative here. But the case does not even stop here; the covenant concludes, as if to prevent the possibility of mis-construction, with the words "in the manner aforesaid,"—words which clearly point out that the former part of the instrument is to be looked to, in order to ascertain the sense in which the covenant is to be taken. And this brings me to the case of *Browning v. Wright*, in which the very same expression is used. Lord *Eldon's* judgment in that case, in which much stress was laid upon the expression last adverted to, and the intention of the parties to be collected from the instrument, is fully confirmed by Mr. Justice *Buller*, one part of whose judgment seems almost as if it had been pronounced on the case before the court. "Covenants being intended for the benefit of the party conveying, let us see how this defendant has protected himself. He has expressly told us in one part of the deed that he means to covenant against his own acts; and are we to say, that he has in the same breath covenanted against the acts of all the world? This would be highly inconsistent. If the court is driven to say that these two covenants must stand together, they must do so, by pronouncing judgment on the words of this particular clause, and shutting

† Per *Eldon*, C. J., 2 B & P. 23.

‡ By Lord *Manfield*, in *Kingston v. Preston*, cited in *Jones v. Barkley*, Doug. 663., and see 1 Wms. Saunders, 60. a., n. 1.

their eyes against all the other parts *of the deed," 2 B. & P. 26. When it is intended to make the covenant general, it is usual to covenant, as in *Howell v. Richards*, against acts, "by any other person or persons whatsoever." The cases of *Gainsford v. Griffith*, and the distinction there taken between that case and *Broughton v. Conway*, together with the case of *Peles and Jervies*, Dyer, 240., margin, and indeed all the prior cases, were discussed in *Browning v. Wright*. That case has never been shaken, but has often been recognised. In *Howell v. Richards* it is recognised by Lord *Ellenborough*, as a case "in which almost all the cases are collected and considered:" and in *Barton v. Fitzgerald*, Mr. Justice *Bayley* recognises the doctrine laid down by the court in *Browning v. Wright*, and, having distinguished it from the case then before the court, says, "there was, therefore, a clear intent apparent in that case, to restrain the general words relied on." I cannot distinguish this case in principle from that of *Browning v. Wright*, and am of opinion that the defendant is entitled to judgment.

PARK, J. On the mere reading of this covenant, connected as it is by the words "and that," with what precedes it, common sense would require that it should be construed as a qualified covenant. But when to this obvious construction is added the authority of *Browning v. Wright*, the case becomes clear beyond all doubt.

BURROUGH, J. The words in this case following in one connected series present the possibility of mis-construction. I have carefully perused the case of *Browning v. Wright*. The only shade of difference between the cases is, that here there is an assignment of a lease, whereas there the conveyance was in fee: with that *modification the case is the same as the present, and [550 is in my opinion precisely in point.

Judgment for the defendant.†

† See *Nind v. Marshall*, 1 Brod. & Bing. 319. [3 Moore, 703. S. C.]

VANSANDAU v. CORSBIE et al.

[2 Moore 602 S. C.]

The acceptor of an accommodation bill, drawn by the defendants before bankruptcy, declared against them specially after their bankruptcy for not providing him with funds to pay the bill when due; whereby he had been forced to pay the costs of an action, and give a *cognovit* for the amount of the bill, and had been obliged to sell an estate in order to raise money for the payment of the same. The defendants pleaded their certificate. The court of C. P. held this a good bar under stat. 49 G. 3. c. 121. s. 8; and the court of K. B. afterwards affirmed the judgment.

ASSUMPSIT. The declaration stated, that in consideration that the plaintiff for the accommodation, and at the request of the defendants, would accept a certain bill of exchange drawn by the defendants on the plaintiff, (and whereby the defendants required the plaintiff, four months after the date thereof, to pay to their order, 1021*l.* 5*s.* 6*d.*.) and would deliver the same so accepted to the defendants, in order that the defendants might negotiate the same for their own use and benefit; the defendants undertook to provide the plaintiff with money for the payment thereof, when the same should become due and payable. The plaintiff then averred, that he, confiding in that promise, did accept the bill and deliver the same so accepted to the defendants for the purpose aforesaid; and that, although the bill so accepted, was afterwards negotiated by the defendants

for their own use and benefit, and the same had long since become due, yet the defendants did not provide the plaintiff with money for the bill, in consequence whereof, the plaintiff at the time when the bill became due, being wholly *551] unprovided with the *means of paying the same, was sued by the holders thereof, in an action brought against him as the acceptor of the bill, and was obliged to pay the sum of 30*l.* for the costs in defending such action, and, having no sufficient defence thereto, was obliged to give a *cognovit* to confess the action; and that afterwards, and when the amount of the bill of exchange and interest became due and payable according to the tenor and effect of the *cognovit*, being unable to pay the same, he was obliged to sell and convey to one *Andrew Burt* his estate and interest in a certain wharf and premises situate in the parish of *Saint Mary Rotherhithe*, in the county of *Surry*, for the purpose of procuring the means of paying the amount of the money due upon the bill, by reason whereof, the plaintiff had not only been put to great expence, but had suffered under great anxiety of mind, and had been greatly injured in his circumstances and credit, and greatly damnified by reason of his having been obliged to sell and dispose of his wharf and premises. The defendants pleaded the general issue and their bankruptcy, and, in their third plea, (after stating the fact of their trading, the petitioning creditor's debt, the issuing of a commission of bankrupt, under which they were duly declared bankrupts, the publication of notice of the commission in the *London Gazette*, the surrender of the defendants, and that the defendants, afterwards, duly obtained their certificates under the commission, which certificates afterwards, and after the commencement of the suit, were duly allowed and confirmed by the then Lord Chancellor;) averred, that before the issuing of the commission of bankrupt, and also before the defendants had committed any act of bankruptcy, the plaintiff had become and was liable for a debt of the defendants, upon and by reason of the bill of exchange in the declaration mentioned, and which bill had been drawn by the defendants, and accepted by the plaintiff for *552] their accommodation, and had been negotiated *by the defendants, and, at the time of the issuing of the commission, remained in the hands of divers persons, being creditors of the defendants. And that afterwards, and before any dividend had been made under the commission, the plaintiff, so being liable after the issuing of the commission, paid the debt for which he was so liable to the holder of the bill of exchange; and that the creditors, who had not proved their debts under the commission, could, and yet might receive under the commission, a dividend equal in proportion to their debts, without disturbing any dividends already made under the commission.

To this plea the plaintiff demurred, and assigned for cause, first, that it did not appear with sufficient certainty by the plea, that the cause of action in the declaration mentioned, was a debt capable of being proved by the plaintiff, as a creditor of the defendants under the commission; and, secondly, that it did not appear that the cause of action in the declaration mentioned, being, as therein stated, uncertain and unliquidated damages, could have been proved by the plaintiff as a debt under the commission of bankrupt.

Lens, Serjt., in support of the demurrer. This is not the ordinary case of an acceptor of a bill, who, on having paid it, has a right to recover from the other parties to the bill: but this action is framed on the breach of a specific contract to provide the money, not for mere non-payment. If this be the case, the sum alleged to be due cannot be proved as a debt under the commission, but is in the nature of special damages; and the plaintiff is not a surety within *553] stat. 49 G. 3. c. 121.† That statute can only apply to such debts *and obligations as the law itself would raise. The plaintiff may never have

† "In all cases of commissions of bankrupt already issued, under which no dividend has yet been made, or under which the creditors, who have not proved, can receive a dividend equal in proportion to their respective debts, without disturbing any dividend already made, and in all cases of commissions of bankrupts hereafter to be issued, where, at the

paid the debt; he may never be able to pay it: but he has still sustained injury by the breach of a special contract, and incurred a liability, for which his remedy is by action. To bring himself within the statute, he must have actually paid the debt out of his own funds; but in this case he is to be supplied with money by another to pay it. [*Dallas*, *C. J. That argument would apply to every case of accommodation bills. *Park*, J. Suppose an acceptor of [*554 an accommodation bill, the drawers of which have become bankrupts, had borne the brunt of an action, and incurred great costs; the commissioners would never permit him to prove for those costs, but only for the sum which he had actually paid.] It makes a material difference if an acceptor accept a bill for a drawer, knowing that he is solvent, and the drawer enters into a special agreement with the acceptor, that he, the acceptor, shall have no occasion to advance money for the acceptance, but shall be provided with funds by the drawer. [*Park*, J. The words of the statute are not merely "where any person shall be surety for," the words immediately following those I have quoted are, "or liable to any debt of the bankrupt." This never was a debt of the drawers; it cannot become such a debt until after the acceptor has failed to pay his acceptance: if, therefore, the acceptor pays this bill, he will pay his own debt, and not that of the drawers. The plaintiff here has taken a special agreement for his security, has declared on that security, and cannot avail himself of the statute.

Copley, Serjt., *contra*, relied on *Stedman v. Martinant*, 13 East, 427, as in point.

Lens, being heard in reply upon the case cited, observed that the judgment of the court there proceeded on the ground, that the second acceptance was a new security for a prior debt, and that in paying the second bill, the acceptor was only paying the same debt which he was liable to pay upon the first bill. The action in that case was for money had and received, the acceptor *had paid the bill, and the point now before the court did not [*555 arise.

DALLAS, C. J. If one man accept a bill for the accommodation of another, and the party accommodated undertake to provide money for it when it becomes due, and fail to make such provision, though all this happen before the bankruptcy, and the acceptor pay the bill after the bankruptcy, and though there be no counter bill for security; the acceptor who pays is such a surety, that he may claim the benefit of the stat. 49 G. 3. c. 121. s. 8.

This is a remedial law in aid of the bankrupt, and, if any man shall pay, after the commission or before, any debt for which he has rendered himself liable before, he shall be permitted to prove under the commission. Here, the

time of issuing the commission, any person shall be surety for or be liable for any debt of the bankrupt, it shall be lawful for such surety or person liable, if he shall have paid the debt, or any part thereof in discharge of the whole debt, although he may have paid the same after the commission shall have issued, and the creditor shall have proved his debt under the commission to stand in the place of the creditor as to the dividends upon such proof; and when the creditor shall not have proved under the commission, it shall be lawful for such surety, or person liable to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and to receive a dividend or dividends proportionably with the other creditors taking the benefit of such commission, notwithstanding such person may have become surety or liable for the debt of the bankrupt after an act of bankruptcy had been committed by such bankrupt; provided that such person had not at the time when he became such surety, or when he so became liable for the debt of such bankrupt, notice of any act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment; provided always that the issuing a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed such notice: and every person against whom any such commission of bankrupt has been or shall be awarded, and who has obtained or shall obtain his certificate, shall be discharged, of all demands at the suit of every such person, having so paid, or being hereby unable to prove as aforesaid, or to stand in the place of such creditor as aforesaid with regard to his debt in respect of such suretyship or liability, in like manner, to all intents and purposes, as if such person had been a creditor before the bankruptcy of the bankrupt for the whole of the debt, in respect of which he was surety, or was so liable as aforesaid." 49 G. 3. c. 121. s. 8

plaintiff was a surety before the bankruptcy; and having reduced the damages to a certainty by payment after the bankruptcy, he may now come in and avail himself of the remedy which is to be found in the statute.

PARK, J. This statute was passed for the relief of bankrupts: for it was thought very hard, that their bankruptcy should not discharge them from those sums which were paid on their behalf, and so became debts, in point of fact, due after their bankruptcy. The Court of King's Bench in *Stedman v. Martinnant*, took no notice of any difference as to the form of action; an argument which has been pressed on us to-day, but in which I cannot at all concur. In the case of every accommodation bill, there is, and always has been, from the time when the practice was first resorted to, an express promise to provide the money for taking up the bill.

*BURROUGH, J. If it had not been for the case of *Stedman v. Martinnant*, I should have thought that the law was very strongly with the plaintiff. But, after the decision in that case, which is not distinguishable from that now before us, I must hold a different opinion; and I, therefore, concur with my learned brothers. As to the arguments raised on the difference of the form of action, it is only necessary to observe, that the difference of the form of action cannot alter the law in this case, which is the case of every accommodation bill.

Judgment for the defendants.†

† Note. See the judgment in this case affirmed, in error, in K. B., 3 B. & A. 13. [See also 2 Maule & Selw. 195, *Wood v. Dodgson*.]

BIRD, Demandant; QUILTER, Tenant; TINDAL, Vouchee.

Demandant's name changed in a recovery, without affidavit of intention or identity of the party or premises.

In this recovery the demandant on the record was *Thomas Bird*.

Copley, Serjt., moved to amend it by substituting the name of *James Bird* as the demandant; and, upon his reading a deed to lead the uses of a recovery, to which deed *James Bird* was a party, without more, the court allowed the amendment.

Fiat.

*557]

*EDELSTEN et al. v. ADAMS.

[2 Moore 610. S. C.]

A friend of the defendant deposited with the sheriff on the defendant's arrest, a sum in lieu of bail under statute 43 G. 3. c. 46. s. 2. Bail was afterwards put in, and the defendant, who had become a bankrupt after the money had been deposited, surrendered in their discharge. The court held themselves bound by the statute to order the repayment of the deposit to the defendant.

COPLEY, Serjt., on a former day, had obtained a rule *nisi* that the sum of 95*l.*, which had been deposited on the behalf of the defendant with the sheriffs of London at the time of his arrest, and by them paid into the hands of the

prothonotaries of this court, might be restored to the defendant or his attorney, pursuant to the act 43 G. 3. c. 46, s. 2, bail having been put in, and the defendant having surrendered himself in discharge of such bail, on an affidavit which stated that *Hammack* paid the sum into the hands of the sheriffs on the defendant's arrest, in lieu of bail, and the other facts mentioned in the rule.

Best, Serjt., now put in an affidavit, which stated that, since the money had been so paid, the defendant had become a bankrupt; and showed for cause against the rule, first, that under the stat. 43 G. 3. c. 46, it was necessary not only that bail should be put in, but perfected; secondly, that the rule should have been framed for the paying back of the money to *Hammack*, who had advanced it, and not to the defendant or his attorney; and, thirdly, that the defendant having become bankrupt, the money, if it could have been considered his before the bankruptcy, was now become the property of his assignees. Under these circumstances, *Best* contended that the court had no jurisdiction to order the money to be paid to the defendant.

Copley, in support of his rule, relied on the cases of *Harford v. Harris*, Ante, iv. 669, and *Chadwick v. Battye*, 3 M. & S. 283, observing *that the money had been merely lodged conditionally for the appearance of the defendant, and that the condition had been fulfilled; that the money was lodged by *Hammack*, and never reduced into possession by the defendant, and could not, therefore, be the property of the assignees; and that there was nothing in this case to take it out of the ordinary course of similar applications, or the operation of the statute. [*558]

DALLAS, C. J. Before the statute of the 43 G. 3. c. 46, the court could not have entertained the present application. Our authority in cases of this description is derived entirely from that act; and the question will be, whether, under that act, we have any general equitable jurisdiction, or whether we have any thing more than a legal jurisdiction. (Here his lordship read the second section of the act.) I can find no latitude of discretion here: the act peremptorily says that the money deposited shall be repaid to the defendant. I am of opinion that we cannot, in a case of this description, go into a collateral trial of the conflicting interests of the different parties; an inconvenience which would assuredly frequently arise if we were to depart from the plain specific direction of the statute. Into the supposed claims of the assignees, or the person who paid the money, I do not, therefore, now inquire; nor has any case been cited to us in which the ordinary course of proceeding prescribed by the statute has ever been infringed. Looking, therefore, to the plain direction of this statute, I feel that we are bound to order the money to be paid over to the defendant.

PARK, J. My brother *Best*, wishes us, upon this ordinary application, to discuss the relative rights of no less than three parties; namely, the rights of *Hammack*, *who paid the money, the rights of the bankrupt, and the rights of the assignees of the bankrupt. Into these relative rights I am of opinion that we cannot enquire. We are bound by the statute; and that directs the repayment, of the money deposited, to the defendant. [*559]

BURROUGH, J., concurred.

Rule absolute.

BROWNE, Clerk, v. RAMSDEN, D. D.

[2 Moore. 612. S. C.]

In an action for dilapidations by a vicar against his predecessor, the plaintiff declared that the defendant was seised of the premises in question in right of his vicarage. The premises were copyhold, and were devised to the master and senior fellows of *Trinity college, Cambridge*, in trust, to permit the vicar for the time being to receive the rents and profits (the charges to the lord, and expenses for necessary reparations, being first deducted :) held, that, as there was no seisin in the vicar, the plaintiff could not maintain this action.

THE plaintiff declared, that by the law and custom of *England*, rectors and vicars for the time being are bound to repair, support, and sustain all the houses, buildings, and tenements belonging to their respective rectories and vicarages, and to leave the same so supported and sustained to their successors; and that in default, they are bound to satisfy so much as shall be expended for the necessary repairing of such houses, &c.; and then averred, that the defendant was vicar of *Chesterton*, and was seised, in the right of the vicarage, (which was above the yearly value of 8*l.*) of and in a certain messuage called *The Vicarage-house*, together with stables, &c. &c. and appurtenances, and also of two other houses, two cottages, &c. &c., and glebe lands, situate at *Chesterton*. The plaintiff then averred, that the defendant had accepted another benefice, and had *560] been inducted into possession thereof; and that the plaintiff *was presented to and duly inducted into the vicarage of *Chesterton*; and that the vicarage-house, stables, &c., and the two other houses, &c., of which the plaintiff was seised in right of the vicarage, were very ruinous and in decay, for want of necessary repairs; and that it was necessary to lay out the sum of 2000*l.* in repairing the same; of which the plaintiff gave the defendant notice, and demanded the same, but that the defendant refused to pay the same. Second count, for committing waste, by pulling down certain rooms of the vicarage-house, and pulling down the cottages, &c.

The defendant suffered judgment by default as to the repairs of the vicarage-house, together with the stables, &c., and the glebe lands; but pleaded not guilty as to the charges concerning the residue of the premises.

At the trial before *Ellenborough, C. J.*, at the last *Cambridge, Lent* assizes, a verdict was entered for the plaintiff for 2000*l.* damages, and 40*s.* costs, subject to a reference, with liberty to the arbitrator to put any question of law which might arise on his award, for the opinion of the court.

The arbitrator taxed the damages sustained by the plaintiff, as far as the same related to the messuage called *The Vicarage-house*, together with the stables, barns, coach-house, and other outhouses and gardens, and the glebe land in the declaration mentioned, and as to which the defendant had suffered judgment by default, at the sum of 460*l.*; and, as to the residue of the matters contained in the declaration, to which the defendant pleaded that he was not guilty, and whereon issue was joined, he found that the same related to customary lands and tenements holden of the lord of the manor of *Chesterton*, by copy of court-roll, and formerly the estate of *John Furthoe, M. D.*, deceased, who by his will in writing, dated the 22d of *January, 1632*, gave and devised unto the then master and eight senior fellows of *Trinity college, Cambridge*, *561] by name, their heirs and assigns for ever, the last-mentioned lands and tenements, in trust, that they the said surrenderees, their heirs and assigns, should permit and suffer the vicar of *Chesterton*, for the time being to take and receive from time to time all the clear rents, issues, and profits which should or might grow or arise out of the said copyhold premises (the charges which should at any time thereafter happen, either in the discharging of the duties which should thereafter accrue to the lord of the said manor in respect of the copyhold, or which should be expended in or about the necessary reparations

and bettering of the same, being first deducted;) and with this further trust and confidence in the said surrenderees, their heirs and assigns, that the survivors of the surrenderees, when all but two of them should be dead, should surrender the copyhold lands and premises, with their appurtenances, *de novo*, to the use of such person and persons as should then be master of *Trinity* college aforesaid, and the eight senior fellows of the said college, their heirs and assigns, upon the like trust and confidence in them reposed, and their heirs, for the good and benefit of the vicar of *Chesterton*, for the time being, as above expressed.

The arbitrator further found, that at the court-leet of the lord of the said manor, holden at *Chesterton*, on the 8th of *May*, 1797, *Richard Newton*, clerk, then sole surviving surrenderee of the last-mentioned lands and tenements, duly surrendered all the last-mentioned lands and tenements to the use of the then master and eight senior fellows of *Trinity* college, their heirs and assigns for ever, upon trust for, and the use and benefit of, the vicar of *Chesterton*, and his successors, vicars of *Chesterton*, for the time being, pursuant to the will of *John Furthoe*; and that the lord, in due form of law, granted and delivered seisin thereof to the last-named surrenderees, *their heirs and assigns [562 for ever, according to the effect of the surrender, and upon the trusts therein mentioned. The arbitrator then found, that the defendant had been in possession of the last-mentioned premises, and in receipt of the rents and profits accruing from the same; but that no surrender or conveyance thereof had since been made to him or to any other person: whereupon he awarded, that the defendant was not seised, and that the plaintiff had no ground of action to recover against the defendant on account of the last-mentioned premises, with leave for the plaintiff to apply to this court; and if this court should be of opinion that the plaintiff had good ground of action against the defendant, under the declaration, he then awarded, that the defendant should pay to the plaintiff the sum of 220*l.*, for the damages by him sustained in respect of the last-mentioned premises, within one month after the giving of such opinion, in the hall of *Trinity* college, and that the costs of such application should be in the discretion of the court; and also the sum of 460*l.*, together with the costs of the cause, within a month after the same should have been taxed by the proper officer of the court, &c.

In the last term,

Blosset, Serjt., had obtained a rule *nisi* that the plaintiff should be at liberty to enter up final judgment upon the verdict obtained by him for 220*l.* upon the case stated in the award, in addition to the sum of 460*l.* and costs thereby awarded.

Copley, Serjt., (with whom was *Lens*, Serjt.,) showed cause against the rule. It is a clear principle of law that the action for dilapidations, which lies only at common law, does not lie unless the vicar is seised in right of the vicarage. It is impossible that the vicar in this case could be seised; for the trustees must continue to *hold the estate, having two important duties to perform; [563 first, to deduct the lord's charges and claims, for which, being the lord's tenants on the rolls, they are themselves liable; and, secondly, to see that the premises are from time to time kept in repair; which purposes they are to make a deduction out of the rents and profits of the estate, *Jones v. Say and Seal*, 1 Eq. Ab. 383. c. 4. If the seisin is not in the vicar, there is a variance between the title declared on and that stated in the case, and the variance is substantial, not formal. It is clear that the statute of uses does not apply to copyhold premises: it cannot be said, therefore, that the vicar is seised in right of the church. The bishop could not have sequestered this estate, for it is vested in the trustees. But the church is not without a remedy. The trustees are liable to a bill in equity to compel them to execute their trust, if they neglect to repair. The case of *Wright v. Smythies*, 10 East, 409, is strong for the defendant: in that case there had been a successive possession for fifty years; but it not having been proved that the vicar was seised in right of his vicarage,

it was held that the action for dilapidations could not be maintained. [*Dallas*, C. J. It is clear that this could not be a use executed. The trustees have specific duties to perform.]

Blosset, contra. Admitting that this was not a use executed, and that the legal estate was in the trustees, who had duties to perform, it is entirely new for a rector sued for dilapidations to rest his defence on the fact that he had no legal estate in the premises. How land or houses ever became annexed to ecclesiastical preferments, and what is the nature of their connexion, is very obscure. Much of the ecclesiastical property in this country is either trust *564] property or copyhold; of which, therefore, *the incumbent cannot be said to be seised. The declaration truly states, that rectors and vicars are bound to repair all houses and buildings of and belonging to their rectories. *Wright v. Smythies*, is with the plaintiff rather than with the defendant. In that action for dilapidations, seisin of the defendants was alleged: the devise was to trustees, but it was since the mortmain act; 9 G. 2, and the defence was that it came within that act, not that the defendants were not seised. [*Burrough*, J. Then that case, as applied to this, cannot be much authority either way. *Dallas*, C. J. I am afraid that you cannot in any way make out that the vicar was seised. In the first place, the statute of uses does not apply to copyholds; and, secondly, even if these premises were freehold, the seisin would be in the trustees, not in the *cestui que use*.] The defendant has received and spent the rents and profits; it is not, therefore, for him to say that the trustees are bound to repair. He is liable to his successor for the repairs, and the court will not enquire into the nature of the title.

DALLAS, C. J. The lands in question, originally copyhold, were devised in the year 1632 to the master and fellows of *Trinity* college, in trust to receive and pay over the rents and profits to the vicar of *Chesterton* (the charges which should happen in discharging the duties which should thereafter accrue to the lord, or which should be expended in the necessary reparations, being first deducted.) The declaration avers, that the vicar was seised of these lands in right of his vicarage; and to support this allegation, a legal seisin must be shown. But copyholds are not within the statute; and if they were, the trustees in this case have specific duties to perform, so that the use could not have *565] been executed. *The allegation, therefore, that the vicar is seised, is not proved, and I am of opinion that the plaintiff is not entitled to recover.

PARK, J. The arbitrator has given the amount of the dilapidations of the ancient church property; so that our judgment will not relieve the vicar from repairs which may be necessary to the same. But the premises which form the more immediate subject of this discussion were devised in more recent times, and in a very particular manner. The trustees, to whom they are devised in trust to pay over the rents and profits to the vicar of *Chesterton*, are subjected, before such payment, to provide for the charges which may be due to the lord, and which may be called for on account of necessary repairs. I am of opinion, therefore, that in this case the common law obligation on the vicar does not attach, the donor of the premises in question having distinctly provided for the necessary repairs in another way.

BURROUGH, J. In order to enable the plaintiff to support the present action, it is necessary that he should establish a seisin by the vicar. In this he has completely failed; for it is clear from the case stated in the award, first, that the estate in question was copyhold; and secondly, that it was the estate of the trustees. I am clearly of opinion that the plaintiff is not entitled to recover.

Rule discharged.

*ALLEN v. WALDEGRAVE.

[2 Moore 621. S. C.]

An act of parliament empowered justices in quarter sessions assembled, or at any adjournment of the same, to build, or order to be built, a bridge, and enacted that they might contract for the building of the same; and that every contractor for such work should give sufficient security for the due performance of his contract to the clerk of the peace; and that the said justices at any general quarter sessions, or adjournment of the same, might appoint such of the justices as they should think fit to superintend the building, &c. The expenses were to be provided for out of the county rate; and it was enacted that, in all actions or proceedings at law, the said justices *might* sue or be sued in the name of the clerk of the peace; and that no action should abate by the death of any such clerk, but that the clerk of the peace for the time being should always be deemed the plaintiff, &c., defendant, or respondent, in all such actions, &c., or proceedings at law respectively; and it was provided that every such clerk of the peace should be reimbursed all damages, &c., and expenses which he should have paid, or be subject or liable to on account thereof, out of the money to be raised by virtue of the act. The plaintiff covenanted with the defendants, who were the superintending justices, and were described in the indenture as the major part of the justices assembled at the general quarter sessions, to build the bridge; and the defendants covenanted, that they, or the treasurer for the county, should pay him a certain sum by instalments. The plaintiff having declared in covenant against the defendants for the non-payment of two instalments: Held, that the defendants were not liable; and that the remedy given by the statute was against the clerk of the peace.

COVENANT, venue *London*.† The action was brought on certain articles of agreement under seal, entered into and made between the plaintiff of the one part, and the defendants, and Lord *St. John*, whom the defendants had survived, of the other part; the defendants and Lord *St. John* being therein described as the major part of the justices of the peace, acting in and for the county of *Bedford*, assembled at the general quarter sessions of the peace for the county of *Bedford*, held by adjournment as therein mentioned; whereby, (after reciting that the justices of the peace acting for the said county of *Bedford*, by virtue of the directions, powers, and authorities given to and vested in them by an act passed in the then last session of parliament, intituled “An act for rebuilding *Tempsford*, bridge, in the county of *Bedford*,” having deter- [*567
mined on erecting a substantial stone bridge across the river *Ouse*, at *Tempsford* aforesaid, did cause public notice to be given, that plans, specifications, estimates, and proposals for building such bridge, would be received at the office of the clerk of the peace, on or before the 5th day of *July* then last; and that it was by the same notice desired, that the persons delivering in such plans, &c., would state the terms upon which they would be willing to contract for performing the works; and reciting that the said justices having attentively examined and considered the various plans, &c., delivered, did approve the designs, plans, and specifications delivered in, and signed by *J. S.*, architect; and did also approve of the proposal of the plaintiff for building a bridge and flood bridges, and making a road or causeway to the same, according to the designs, plans, and specifications of *J. S.*, for the sum of 9550*l.*; and that the said justices being satisfied that the said proposal was at the most reasonable rate, did resolve upon entering into a contract with the plaintiff for the performance of the said works accordingly; it was witnessed that the plaintiff, in consideration of the premises, and of the covenants and agreements thereafter mentioned on the part and behalf of the said justices, did covenant with them, that he would, on or before the 6th of *November*, 1818, erect a substantial new bridge of three arches over the river *Ouse*, in the parishes of *Tempsford* and *Roxton*, in the county of *Bedford*; and also two flood bridges of seven arches each, in the meadows on each side of the river; and also make approaches and roads to connect the bridges so to be erected across the river at each end thereof, and the said flood

† See *post*. 571, note.

bridges with the turnpike road, called the *Great North Road*, and in manner *568] specified in the schedule thereafter referred to, corresponding *with four designs delivered in, and signed by J. S., and also signed by the plaintiff, and that with the best materials of the different sorts and kinds suitable, proper, and necessary for the purpose, to the satisfaction of the justices of the peace of the said county of *Bedford*, and their surveyor; also, that in case any additional or extra works, or alterations, to or from the said designs, plans, schedule, or particular, should by the said justices, or their surveyor, be thought necessary to be made or done during the course of the erecting or carrying on any of the said works, then the same additional or extra works, or alterations, should be made; and such additional or extra works, or alterations, should not in any wise do away, effect, or vitiate the present contract or agreement; but particulars in writing of such additional or extra works, or alterations, should be delivered by the said justices or their surveyor to the plaintiff, previously to the doing thereof; and he, the plaintiff, would perform such addition or extra works, or alterations, accordingly. And it was agreed, that the plaintiff should be paid for such additional works, or alterations, after such rate as should be fixed and determined by the surveyor of the justices for the time being, and which should be binding upon all the parties thereto. And Lord *St. John* and the defendants thereby covenanted with the plaintiff, that the justices of the said county of *Bedford*, or the treasurer of the county for the time being, should pay, or cause to be paid, to the plaintiff, for the said intended works, 9550*l.*, subject to addition in manner aforesaid, in the several proportions and on the several days and times thereafter mentioned for payment thereof, *viz.* by eleven instalments; and also, that the justices should purchase such land or ground within the limits expressed by the said act of parliament, or any other act of parliament then in force relating to the building county bridges, as should be *569] *necessary for building, forming, and completing the said intended bridge, flood bridges, approaches, and roads, according to the said designs or plans, schedule or particular; and that it should be lawful for the plaintiff to enter upon the land to be purchased, and thereon to execute the intended works; and that it should be lawful for the plaintiff, his workmen and servants, to have, use, and execute all and every the powers and authorities given by the said first-mentioned act of parliament or any other act of parliament then in force, to justices of the peace, or any surveyor of county bridges in *England*, or any bridgemaster, or any person or persons who might be under contract for the rebuilding or repairing of any public bridge, built or repaired at the expense of the inhabitants of any county, to search for, work, dig, get, and carry away any stone, gravel, sand, or other materials for the works therein before mentioned, which should be necessary for building the bridge in such manner as is directed by such acts of parliament.

The plaintiff in the declaration stated the covenant on his part to erect the bridge, &c.; and the covenant on the part of the defendants, for the payment to him of the money for erecting the same: and averred performance on his part, and a breach on the part of the defendants by making default in the payment of two instalments. The defendants cravedoyer of the deed, and demurred generally, and the plaintiff joined in demurrer.†

† The act referred to (55 G. 3, c. 30.) enacted, that it should be lawful for the justices of the peace in and for the county of *Bedford*, assembled at any general quarter session of the peace, to be held in and for the said county of *Bedford*, or at any adjournment of the same, to build, or order and direct to be built, a substantial new bridge across the river *Ouse*, in such place or situation at or within the distance of two hundred yards from the place where the bridge, called *Tempsford* bridge, then stood, according to such designs, plans, and specifications, and in such manner as they, the justices, should approve, order, and direct; and to contract for the building such intended bridge, with a direction that the contractor should give sufficient security for the due performance of his contract to the clerk of the peace. Sect. 1.

And they were enabled, if they thought proper, from time to time, at any general quarter session of the peace, or any adjournment thereof, to nominate and appoint such

**Blossel*, Serjt., in support of the demurrer. Considering the general object of this act, and other acts *in paria materia*, it cannot be contended that these justices *are personally liable to the defendants. The action ought not to have been brought against them individually, but against the clerk [*571 of the peace of the county, the person who is directed by the act to be the plaintiff and defendant in all actions arising thereon. By the first section of the act, the magistrates are authorised to contract; and the contractor is directed to give security for the performance of his contract, not to the justices, but to the clerk of the peace. If the act contemplated that the justices and not the clerk of the peace were to be sued, why does it not direct that the contractor's security should be given to them, rather than to the clerk of the peace? The expense of building is charged, by the fourth section, on the county rate.

The court interposing, called on *Copley*, Serjt., to support the declaration.

Copley, contra. The fair construction of the act, as applied to making the clerk of the peace the party to be sued, is pointed only to torts, and not to actions for breach of contract. [*Dallas*, C. J. The ninth section enacts, that in all actions the justices may sue and be *sued in the name of the clerk [*572 of the peace, and that he shall always be deemed the plaintiff; and all the provisions of the statute contemplate this situation of the clerk of the peace. *Burrough*, J. Whether the action be an action of covenant or not, you cannot recover against the party contracting for the public service; that was laid down in *Macbeath v. Haldimand*, 1 T. R. 172, and has been acted upon ever since.] The second point is, that *may* is not imperative, but leaves it open to the suitor to proceed either against the clerk of the peace or against the justices, at his option. In acts of parliament of this description, the words of the act must be taken strictly. Those words are, "The justices *may* sue and be sued in the

of the said justices as they should think fit, to superintend and manage the building, erecting, and completing of the said intended bridge, and other works connected therewith; and to determine how many of such superintending justices should constitute a quorum, and be sufficient to act; and from time to time to remove such superintending justices, and appoint other superintending justices in their stead. Sect. 2.

And the powers of all acts relating to county bridges and rates were extended to this act. Sect. 3.

And the justices were enabled, at any general quarter sessions of the peace, or any adjournment of the same, from time to time, to cause such sums of money as they should judge necessary for the purposes of the act, to be raised in the manner directed in stat. 12 G. 2, intituled An act for more easy assessing, &c., of county rates. Sect. 4.

And the justices were empowered at any general quarter session of the peace, or at any adjournment of the same, to appoint a treasurer, and one or more collector or collectors of the tolls, by that act granted, and a surveyor of the bridge and the works connected therewith, and such other officers as they should think necessary for executing the powers and authorities thereby given. Sect. 5.

And it was enacted that, in all actions, causes, suits, bills, plaints, indictments, prosecutions, trials, or proceedings at law, to be held, brought, prosecuted, or defended in pursuance of that act, the said justices *might* sue, and be sued in the name of the clerk of the peace for the said county of *Bedford* for the time being; and that no action or proceeding should abate or be discontinued by the death or removal of any such clerk of the peace; but that the clerk of the peace for the said county for the time being should always be deemed the plaintiff, prosecutor, informant, appellant, defendant or respondent in any such action, cause, suit, bill, plaint, indictment, prosecution, trial, or other proceeding, as the case should be; and that in all such actions, causes, suits, bills, plaints, indictments, prosecutions, trials, or proceedings at law, it should be sufficient, to lay, charge, and state generally, the article or articles, thing or things, for or in respect of which any such action, cause, suit, bill, plaint, indictment, prosecution, trial, or proceeding should be brought, preferred, or proceeded in, to be the property of the said clerk of the peace for the time being, under the style and description of the clerk of the peace for the county of *Bedford*; and it was provided that every such clerk of the peace should be reimbursed all such damages, costs, charges, and expenses as he should have paid, or be subject or liable to on account thereof, out of the money arising by virtue of that act. Sect. 9.

Note. By the 41st section, after the usual provision that no action should be commenced against any person for any thing done in pursuance of that act until one month's notice, or after satisfaction tendered, nor after three calendar months next after the fact committed, it was enacted, that every such action should be brought, laid, and tried in the county of *Bedford*, and not elsewhere. The defendants objected to the venue as laid; but the case was argued only on the broad ground of the liability of the defendants.

name of the clerk of the peace." [*Dallas, C. J.* If the justices are to be made defendants, where is the fund from which they are to be reimbursed? The clerk of the peace is to be reimbursed out of the county rate, s. 9.] Then how is this strange direction to be construed. It proceeds to state, s. 9, that it shall be sufficient to aver the property to be in the clerk of the peace "in all such actions," alluding to actions arising from infringements, actions arising in consequence of something done in pursuance of the act. But this action is not so brought; it is on a contract. That contract is, indeed, directed by the act; but the act authorises no such action as this, which is not for any thing done in pursuance of this act. If the justices have acted improperly, if they have been guilty of any breach of contract into which they have impropiously entered, there is no reason why they should have any remedy against the county for damages, to which they have rendered themselves liable by their own wrongful act. If the plaintiff recover in this action, it will be in consequence of the commission of a wrongful act done by the justices; *so
*573] that there is no reason for saying that the action will not lie, because it is brought against these defendants, in consequence of a public act done by them. This contract is under seal, and by the common law, the parties to such contract are personally liable. It is laid down, that acts of parliament of this kind are to be construed strictly, not liberally, 2 Sid. 63, *Pool v. Neel*. The act of parliament says *may*, not *must*; and affirmative words cannot destroy common law rights. *Com. Dig.* tit. *Parl.* let. R. 23. *Townsend's case*. Then, as to the words "shall always be deemed," s. 9, which may be urged as justifying the construction of *may* to mean *must*, all that is there meant is, that where the action is brought by or against the clerk of the peace, and he dies, his successor shall be made plaintiff, prosecutor, or defendant, so that the case stands as at first; the action *may*, not *must*, be sued by or against the clerk of the peace.

By the 43 G. 3. c. 59. s. 3,† which the penner of this statute in all probability had lying before him, the surveyor for the time being is mentioned as the person in whom, upon any action or indictment, the property in the tools, &c. "may be laid." But this is not imperative; it only gives an option, and appears to refer to torts only. Persons, indeed, who contract publicly on behalf of the government, whether by deed or not, cannot be sued; but this doctrine has never been extended to contracts of this nature.

DALLAS, C. J. The only question in this case is, whether this action ought to have been brought against the defendants, selected out of the general body
*574] of "justices of the peace for the county of Bedford, or against the clerk of the peace for that county. If the action had been brought against the clerk of the peace, not a shadow of doubt could have been raised that such action would have well lain. The plaintiff, by his selection of these defendants, has thought fit to raise the question, whether the actions may not be brought indifferently, either against the justices or against the clerk of the peace. Now, upon common sense and reason, as well as the general policy of the law, no doubt can be entertained but that the clerk of the peace is the proper person to be sued. Let us pause for a moment, to look at the facts of this case. By the first section of the statute, power is given to the justices of the peace for the county of Bedford, assembled at any general quarter session, or at any adjournment of the same, to build a bridge; and the said justices are thereby authorised to contract for the building of the same. The second section authorises the said justices to nominate and appoint such of their fellows as they shall think fit, to superintend and manage the building. These defendants are the superintending justices; and it is to be contended, that they, having taken on themselves the superintendence of a public work, are to be selected from the body of the justices to be sued in this action. It is a broad principle, as estab-

† General act relative to building and repairing county bridges.

lished by *Macbeath v. Haldimand* and *Unwin v. Wolseley*, 1 T. R. 674, that when a person engages in a contract on behalf of the public, and, in performance of a public duty, such person shall not be personally responsible in an action on that contract. Now these defendants fall within this principle, unless it be narrowed by the words of the act. By the first section the contractor is to give sufficient security for the due performance of his contract, not to the justices, but *to the clerk of the peace. By the ninth section, "in all [*575 actions, causes, suits, bills, complaints, indictments, prosecutions, trials, or proceedings at law, to be had, brought, prosecuted, or defended, in pursuance of this act, the said justices may sue and be sued in the name of the clerk of the peace." Now this is a proceeding in pursuance of the act; and, after reading these most comprehensive words, it is hardly necessary to say, that they cannot be confined to actions, &c. in the nature of torts. But let us look further. The section then proceeds, "and that no action or proceeding shall abate or be discontinued by the death or removal of any such clerk of the peace, but, that the clerk of the peace for the said county for the time being SHALL *always* *be deemed the plaintiff*, prosecutor, informant, appellant, defendant, or respondent, in any such action, cause, suit, bill, complaint, indictment, prosecution, trial, or other proceeding, as the case shall be." But the section does not stop here; it goes on thus—"Provided always, that every such clerk of the peace shall be reimbursed all such damages, costs, charges, and expenses as he shall have paid, or be subject or liable to on account thereof, out of the money arising by virtue of this act;" providing for the repayment of damages, costs, and expenses, not to the justices, but to the clerk of the peace. Upon every principle, therefore, of reason, justice, and public policy, I am clearly of opinion, that this action ought to have been brought against the clerk of the peace and not against these defendants.

PARK, J., concurred.

BURROUGH, J. These defendants have acted under the authority of an act of sessions, and are, therefore, the agents for the county at large; they form a part of the justices in session, and it would be monstrous to hold them, the agents of a public work, individually *responsible. The act of parliament is plain in its directions, that the clerk of the peace, to whom the [*576 security is to be given by the contractor, and who is to be reimbursed out of the county rate, is the party who is to sue or be sued. It would be a breach of all legal principle, public policy, and justice, to hold that this action is well brought against these defendants.

Judgment for the defendants.†

[† See 1 Greenleaf's Rep. 231, *Stinchfield v. Little*, and cases there cited. 15 Johns. 1, *Rathbone v. Sidalong*.]

FOTHERGILL v. WALTON, et al.

[2 Moore 630. S. C.]

By charter-party between the ship-owner and freighters, the ship owner covenanted to take on board six pipes of brandy at *Havre*, and therewith proceed to *Terciera*, and there take on board a complete cargo of fruit or other goods, as the freighters might think fit, and proceed to *London* or *Bristol*, as might be ordered by the freighters, and there make a right and true delivery of the fruit, &c.; and the freighters covenanted to pay certain freight for the fruit and the brandy, the freight of brandy, &c. to be taken out in fruit at *Terciera*, and guaranteed the ship a full cargo home: held, that the cov-

enant to take the brandy to *Terciera*, was not a condition precedent, but a distinct and independent covenant. And, therefore, the owner, in an action of covenant on the charter-party against the freighters for not putting a full cargo of fruit on board at *Terciera*, having averred general performance, the declaration was held good on demurrer.

COVENANT on a charter-party of affreightment, dated 28th of *November*, 1816, between the plaintiff, (ship's husband of the *Elizabeth*,) then lying at the port of *Havre de Grace*, in *France*, of the one part, and the defendants, merchants and freighters of the said ship, of the other part; whereby it was witnessed, that the plaintiff had letten, and that the defendants had hired and taken the ship *Elizabeth*, to freight, upon the terms and conditions thereafter mentioned; viz. the plaintiff covenanted with the defendants, "that the ship being staunch, &c. should take on board six pipes of brandy of good quality, with such other goods as the captain might procure on freight, and therewith proceed with all possible dispatch to the island of *Terciera*, and, either at the said island, *577] or the island of *St. Michael*, *as might be ordered by the defendants or their agents, the master to take, load, and receive on board a complete cargo of green fruit in boxes, or such other lawful goods and merchandise as the defendants or their agents might think fit to send alongside, not exceeding what he could reasonably stow and carry over and above her tackle, &c.; and being so loaded and dispatched, the said master should immediately depart with the ship and cargo on board, and proceed with all possible dispatch into the port of *London*, or into the port of *Bristol*, as might be ordered by the defendants or their agents; and at such ordered port or place of discharge, after given due notice, should make a right and true delivery of all the fruit, or other lawful goods or merchandise, thus to be loaded on board her, agreeably to bill or bills of lading that might be regularly signed for the same, (the act of God, &c. &c. excepted.) And the plaintiff also covenanted, promised, and agreed with the defendants, that for and during her homeward bound voyage, the said ship should be ballasted with stones or shingles, and not with sand, and the boxes to be stowed according to custom; and also, that the said ship should, on her homeward voyage, if required, call at *Falmouth*, for the purpose of receiving orders from the defendants or their agents; and furthermore, that for the purpose of loading the ship at the island of *Terciera*, or the island of *St. Michael*, and discharging at her ordered port of discharge, the ship should stay and lie twenty-five running days in the whole, if required; the said running days to commence immediately on arrival in a proper place to discharge and receive her cargo. In consideration of the completion of the said voyage, the defendants or their agents agreed to pay, or cause to be paid to the plaintiff, his executors, &c. the sum *578] of 6*l.* for every ton of twenty boxes, *London* size, or any quantity *less than a ton, together with ten guineas gratuity to the captain, and five guineas more in case of completing the passage from the island in which he received his cargo, in less than eighteen days, and average according to the custom of the sea, should any accrue; provided that it should be lawful for the defendants or their agents to keep the ship on demurrage ten running days, at the rate of four guineas a day, to be paid day by day as the same might grow due. The plaintiff engaged to ship, or cause to be shipped, at the aforesaid port of *Havre de Grace*, the aforesaid six pipes of brandy at the regular shipping price of the day; the defendants or their agents agreed to pay freight on the said brandy at and after the rate of 4*l.* sterling per ton, together with all brokerage, insurances, commissions, and expenses of the same, and to pay all port charges at *Havre* and *Terciera*, and differences arising between taking ballast and a full cargo: and also to pay all duties and expenses on the brandy at *Terciera*. The vessel to have the liberty of taking any cargo that might present itself for *Terciera*, or the neighboring islands, the freight of brandy, together with the amount of the same insurance, &c. to be taken out in fruit, if at *Terciera*, in all *January*, at 10*s.* per box free on board, if after that time at *Terciera*, at the shipping market price; if the vessel should load at *St.*

Michael's, the price to be at the shipping market price of the day of putting the same on board. The defendants or their agents in that case to pay a proportion of port charges, according to their proportion of cargo. The defendants or their agents also agreed to advance money at *Terciera*, to the captain for the ship's use; and the defendants guaranteed that the ship should have a full and complete cargo home. If the ship should have taken at the port where she then lay, any part of a cargo for *London*, or any port of *Great Britain*, *the vessel to be allowed to go to such port or place to deliver the same, [*579 and from thence to the aforesaid island, without detriment to that charter-party; and for the true performance of all and singular the articles, covenants, and agreements therein contained, and every part thereof, the said contracting parties bound themselves, their respective heirs, administrators, &c.; the owner, his said ship with her freight, &c.; and the defendants, their goods and merchandises so to be loaded on board the said ship, in the sum of 500l., &c. &c."

The plaintiff having in the declaration set forth the charter-party, averred general performance on his part; and that the master, with the ship, on the 10th of *February*, 1817, proceeded to *Terciera*, according to the meaning and effect of the charter-party; and, on the 1st of *April*, 1817, arrived there, and was then ready and willing to receive on board the ship a full and complete cargo of green fruit, either at *Terciera*, or *St. Michael's*, as might be ordered by the defendants or their agents, according to the true intent, &c. of that charter-party; and that he was ready and willing to have performed all things in the same, on his part to be done and performed according to the true intent, &c. of the same, and then averred for breach, that the defendants did not, nor would, either at the said island of *Terciera*, or at the island of *St. Michael*, load or put on board the ship a full and complete cargo, according to the meaning and effect of that charter-party, or any cargo, or part of a cargo whatever.

The defendants craved oyer of the charter-party, which being set forth as above stated, they demurred generally; and the plaintiff joined in demurrer.

Lens, Serjt., in support of the demurrer. It is not sufficient for the plaintiff to aver performance generally. The specific performance of that which he was *to perform as a condition precedent, viz. the shipping of the pipes of brandy at *Havre*, ought to have been averred, *Ughtred's case*, 7 Rep. [*580 9. a. A simple contract to bring fruit, absolutely, and at all events to this country, was never contemplated by the parties; but the defendants agreed, that, on being furnished with brandy by the plaintiff at the port of *Havre*, they would on their arrival at *Terciera*, or *St. Michael*, take in a cargo of fruit. If the ship had taken out the cargo of brandy, the defendants would have had it in their power to return with the fruit. The ship returned empty, because the plaintiff neglected to ship the lading, which would have been bartered by the defendants for fruit, had such lading been shipped. The answer, therefore, to the plaintiff's averment, that the defendants would not furnish the cargo of fruit at *Terciera*, is, that the plaintiff by neglecting to ship the outward cargo at *Havre*, prevented them from doing so. [*Dallas*, C. J. If the plaintiff had omitted wilfully to get more than five pipes of brandy when he might have procured all the six, would that have discharged the plaintiff?] The plaintiff must, in that case, have averred, that he could not get any more brandy. [*Burrough*, J. In the case of *Storer v. Gordon*, 3 M. & S. 308, the outward bound cargo was never delivered.]

Vaughan, Serjt., *contra*. In *Storer v. Gordon*, though the covenant on the part of the ship owner was to proceed to *Naples*, and there to deliver the outward cargo, and *having so done*, to receive on board a return cargo, it was held, that the delivery of the outward cargo was not a condition precedent to the providing of a return cargo. The argument for the plaintiff does not require that the case in *Coke*, cited on the other side, should be impunged. *The supposition, that want of goods in the market would excuse this condi- [*581

tion precedent, if it exists, is totally without foundation. The inconvenience attending a condition precedent would form no reason for the non-performance of it. If such a condition here exists, the plaintiff is bound to perform it; but the question as to conditions precedent does not depend on the order of the covenants, but upon the good sense of the whole agreement. If the plaintiff had put on board five pipes of brandy, and they had been accepted, and if a cargo of fruit had been brought back, the contract of the plaintiff would not have been fulfilled, and he must have lost his freight, supposing the shipping of the brandy to be a condition precedent. The outward cargo *may* be intended as the fund to procure the homeward cargo; but it by no means follows, that it *must* be so; and, in very many instances, this homeward cargo is procured and in readiness to ship before the outward cargo arrives. The delivery of the outward bound cargo cannot, therefore, be considered as a condition precedent.† In *Boone v. Eyre*,‡ which is recognised in the *Duke of St. Alban's v. Shore*, 1 H. Bl. 270, and, subsequently, in *Campbell v. Jones*, 6 T. R. 570, Lord Mansfield, lays down the distinction as clear, that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. So here, the remedy should have been by a cross-action.

*582] *Lens* in reply, said, that he did not question the law as laid down in the cases cited on the other side, but in *Storer v. Gordon*, the homeward voyage was perfectly unconnected with the outward voyage, whereas his argument was, that in the case before the court, the return voyage was a branch of the outward voyage: he admitted, that if the homeward voyage did not grow out of the outward voyage, the defendants must fail.

DALLAS, C. J. The only question here, is whether the shipping of the six pipes of brandy at *Havre de Grace*, and the delivery of them at *Terciera*, is a condition precedent. The plaintiff agrees to take out the six pipes, deliver them there, and take in fruit. Now does, or does not this go to the whole of the consideration? does it form a consideration precedent, or are the covenants distinct and independent? If the plaintiff's covenant be a condition precedent, he cannot recover; if the covenants be distinct and independent, the defendants must resort to their action on the plaintiff's distinct and independent covenant. The arguments for the defendants goes this length, that the plaintiff was bound to take on board the whole, that his covenant formed a condition precedent, and that the omission of shipping one pipe of brandy would have been a breach of the condition. The language of Lord Mansfield in the case of *Boone v. Eyre*, is applicable to this argument: "If this plea," viz. that the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation, "were to be allowed, any one negro not being the property of the plaintiff, would bar the action." The doctrine laid down in that case is, that "where

*583] mutual covenants go to the whole consideration on both sides, they are mutual covenants, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." Now, here, the covenant goes only to a part of the consideration; the breach of it may be paid for in damages; and the remedy of the defendants is, therefore, by action. The doctrine in *Boone v. Eyre*, on which this last proposition is founded, has all the weight which some of the greatest names in *Westminster Hall* can give it. That doctrine was laid down by Lord Mansfield, it was next recognised by Lord Loughborough, and formed the ground of the determination of the Court of Common Pleas, in the case of the *Duke of St*

† *Per Ellenborough, C. J., Storer v. Gordon*, 3 M. & S. 321.

‡ 1 H. Bl. 273. n. See also 2 W. Bl. 1312.

Michael's, the price to be at the shipping market price of the day of putting the same on board. The defendants or their agents in that case to pay a proportion of port charges, according to their proportion of cargo. The defendants or their agents also agreed to advance money at *Terciera*, to the captain for the ship's use; and the defendants guaranteed that the ship should have a full and complete cargo home. If the ship should have taken at the port where she then lay, any part of a cargo for *London*, or any port of *Great Britain*, *the vessel to be allowed to go to such port or place to deliver the same, [*579 and from thence to the aforesaid island, without detriment to that charter-party; and for the true performance of all and singular the articles, covenants, and agreements therein contained, and every part thereof, the said contracting parties bound themselves, their respective heirs, administrators, &c.; the owner, his said ship with her freight, &c.; and the defendants, their goods and merchandises so to be loaded on board the said ship, in the sum of 500*l.*, &c. &c."

The plaintiff having in the declaration set forth the charter-party, averred general performance on his part; and that the master, with the ship, on the 10th of *February*, 1817, proceeded to *Terciera*, according to the meaning and effect of the charter-party; and, on the 1st of *April*, 1817, arrived there, and was then ready and willing to receive on board the ship a full and complete cargo of green fruit, either at *Terciera*, or *St. Michael's*, as might be ordered by the defendants or their agents, according to the true intent, &c. of that charter-party; and that he was ready and willing to have performed all things in the same, on his part to be done and performed according to the true intent, &c. of the same, and then averred for breach, that the defendants did not, nor would, either at the said island of *Terciera*, or at the island of *St. Michael*, load or put on board the ship a full and complete cargo, according to the meaning and effect of that charter-party, or any cargo, or part of a cargo whatever.

The defendants cravedoyer of the charter-party, which being set forth as above stated, they demurred generally; and the plaintiff joined in demurrer.

Lens, Serjt., in support of the demurrer. It is not sufficient for the plaintiff to aver performance generally. The specific performance of that which he was *to perform as a condition precedent, viz. the shipping of the pipes of [*580 brandy at *Havre*, ought to have been averred, *Ughtred's case*, 7 Rep. 9. a. A simple contract to bring fruit, absolutely, and at all events to this country, was never contemplated by the parties; but the defendants agreed, that, on being furnished with brandy by the plaintiff at the port of *Havre*, they would on their arrival at *Terciera*, or *St. Michael*, take in a cargo of fruit. If the ship had taken out the cargo of brandy, the defendants would have had it in their power to return with the fruit. The ship returned empty, because the plaintiff neglected to ship the lading, which would have been bartered by the defendants for fruit, had such lading been shipped. The answer, therefore, to the plaintiff's averment, that the defendants would not furnish the cargo of fruit at *Terciera*, is, that the plaintiff by neglecting to ship the outward cargo at *Havre*, prevented them from doing so. [*Dallas*, C. J. If the plaintiff had omitted wilfully to get more than five pipes of brandy when he might have procured all the six, would that have discharged the plaintiff?] The plaintiff must, in that case, have averred, that he could not get any more brandy. [*Burrough*, J. In the case of *Storer v. Gordon*, 3 M. & S. 308, the outward bound cargo was never delivered.]

Vaughan, Serjt., *contra*. In *Storer v. Gordon*, though the covenant on the part of the ship owner was to proceed to *Naples*, and there to deliver the outward cargo, and *having so done*, to receive on board a return cargo, it was held, that the delivery of the outward cargo was not a condition precedent to the providing of a return cargo. The argument for the plaintiff does not require that the case in *Coke*, cited on the other side, should be impunged. *The supposition, that want of goods in the market would excuse this condi- [*581

tion precedent, if it exists, is totally without foundation. The inconvenience attending a condition precedent would form no reason for the non-performance of it. If such a condition here exists, the plaintiff is bound to perform it; but the question as to conditions precedent does not depend on the order of the covenants, but upon the good sense of the whole agreement. If the plaintiff had put on board five pipes of brandy, and they had been accepted, and if a cargo of fruit had been brought back, the contract of the plaintiff would not have been fulfilled, and he must have lost his freight, supposing the shipping of the brandy to be a condition precedent. The outward cargo *may* be intended as the fund to procure the homeward cargo; but it by no means follows, that it *must* be so; and, in very many instances, this homeward cargo is procured and in readiness to ship before the outward cargo arrives. The delivery of the outward bound cargo cannot, therefore, be considered as a condition precedent.† In *Boone v. Eyre*,‡ which is recognised in the *Duke of St. Alban's v. Shore*, 1 H. Bl. 270, and, subsequently, in *Campbell v. Jones*, 6 T. R. 570, Lord Mansfield, lays down the distinction as clear, that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. So here, the remedy should have been by a cross-action.

*582] *Lens* in reply, said, that he did not question the law as laid down in the cases cited on the other side, but in *Storer v. Gordon*, the homeward voyage was perfectly unconnected with the outward voyage, whereas his argument was, that in the case before the court, the return voyage was a branch of the outward voyage: he admitted, that if the homeward voyage did not grow out of the outward voyage, the defendants must fail.

DALLAS, C. J. The only question here, is whether the shipping of the six pipes of brandy at *Havre de Grace*, and the delivery of them at *Terciera*, is a condition precedent. The plaintiff agrees to take out the six pipes, deliver them there, and take in fruit. Now does, or does not this go to the whole of the consideration? does it form a consideration precedent, or are the covenants distinct and independent? If the plaintiff's covenant be a condition precedent, he cannot recover; if the covenants be distinct and independent, the defendants must resort to their action on the plaintiff's distinct and independent covenant. The arguments for the defendants goes this length, that the plaintiff was bound to take on board the whole, that his covenant formed a condition precedent, and that the omission of shipping one pipe of brandy would have been a breach of the condition. The language of Lord Mansfield in the case of *Boone v. Eyre*, is applicable to this argument: "If this plea," viz. that the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation, "were to be allowed, any one negro not being the property of the plaintiff, would bar the action." The doctrine laid down in that case is, that "where

*583] mutual covenants go to the whole consideration on both sides, *they are mutual covenants, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." Now, here, the covenant goes only to a part of the consideration; the breach of it may be paid for in damages; and the remedy of the defendants is, therefore, by action. The doctrine in *Boone v. Eyre*, on which this last proposition is founded, has all the weight which some of the greatest names in *Westminster Hall* can give it. That doctrine was laid down by Lord Mansfield, it was next recognised by Lord Loughborough, and formed the ground of the determination of the Court of Common Pleas, in the case of the *Duke of St*

† *Per Ellenborough, C. J., Storer v. Gordon*, 3 M. & S. 321.

‡ 1 H. Bl. 273. n. See also 2 W. Bl. 1312.

Alban's v. Shore; it was then sanctioned by Lord *Kenyon* and the rest of the Court of King's Bench, in the case of *Campbell v. Jones*; and was afterwards enologized by Lord *Ellenborough* in delivering the judgment of the court, in *Havelock v. Geddes*, 10 East, 564. But if more authority be required, we have the case of *Storer v. Gordon*; a case much stronger than this; for there the words "having so done" were immediately consequent on the covenant for the right and true delivery of the outward cargo. I am of opinion, that the covenant in this case to ship the brandy was not a condition precedent, but a distinct and independent covenant.

PARK, J. The case of *Boone v. Eyre*, to the doctrine of which we now adhere, much resembles the case at present before the court. In *Glazebrook v. Woodrow*, 8 T. R. 366, though the decision was, that the covenants were dependent, the distinctions between dependent and independent covenants are well taken by *Lawrence* and *Le Blanc, Js.* in commenting on the case [*584 of *Boone v. Eyre*. In *Ritchie v. Atkinson*, 10 East, 295, it was agreed that a complete cargo should be delivered on being paid freight; the master brought only a short cargo, yet, there it was held, that the master might recover freight for a short cargo at the stipulated rate; the freighter having his remedy in damages for the short cargo against the master on his distinct independent covenant.

BURROUGH, J. *Storer v. Gordon*, which was decided after the other cases, and which recognises them all, applies in all its parts to this case.

Judgment for the plaintiff.†

† [See Dalis. 94. pl. 17. 2 Johns. 145. 207. 272. 387. 10 ib. 90. 12 ib. 192. 400. Yelv. 134 (*Metcalf's ed.*) note. 1 Saund. 319. note, and the cases there collected.]

M'DOUGAL v. PATON.

[2 Moore 644. S. C.]

To *assumpsit* for money paid, the defendant pleaded his bankruptcy and certificate, and that the plaintiff, before the issuing of the commission, was surety for the defendant's debt, and that the money paid, was paid by the plaintiff as his surety, after the issuing of the commission, and before a final dividend. Replication, that the plaintiff, before issuing the commission, was surety to J. for the defendant, that the defendant should perform articles of agreement by which an annual rent was to be paid by the defendant; that after his bankruptcy, rent became due by the defendant, and that the money was paid by the plaintiff as the defendant's surety, by reason of the defendant's non-payment, and for the costs of an action by J. against the plaintiff as surety: Held, on demurrer, that the plaintiff was not surety for, or liable to a debt at the time of issuing the commission; and that he was, therefore, not within the eighth section of the 49. G. 3. c. 121.

ASSUMPSIT for money lent, and on the other money counts. Pleas, first, *non assumpsit*; Lastly, to the second count for money paid, the defendant's bankruptcy, (the date of the commission being the 23d of October, *1812:) that he obtained his certificate on the 1st of February, 1813; and that [*585 the plaintiff, before and at the time of the issuing of the commission, was surety for a certain debt of the defendant, and that the money in that count of the declaration mentioned, and thereby supposed to have been paid by the plaintiff for the use of the defendant, was so paid by the plaintiff as such surety as aforesaid, after the issuing of the commission, and before a final dividend had been made under the same, of the estate and effects of the defendant, whereby and

by force of the statutes in such case made and provided, the plaintiff became and was entitled to prove his demand in respect of such payment, as a debt under the commission, and to receive a dividend thereon proportionably with the other creditors taking the benefit of the commission, and this, &c. Replication to the last plea, that the plaintiff before and at the time of the issuing of the commission, was surety to *John Inglis*, for the defendant, that the defendant should well and duly perform and keep all and singular the articles, matters, and things, contained in certain articles of agreement, before then entered into between *John Inglis*, as treasurer of the *London Dock Company*, for and on behalf of the company of the one part, and the defendant of the other part; and that by the said articles of agreement, certain rents, to wit, a rent of 117*l. per annum* was to be paid yearly by the defendant for certain premises therein mentioned; and that, after the supposed bankruptcy of the defendant, as in the said second plea mentioned, to wit, on the 25th of *March*, 1816, the sum of 351*l.* for three years of the said rent ending on that day, became due and was payable from the defendant by virtue of the agreement; and that the money in the second count of the declaration, alleged to have been paid by the plaintiff *582] for the use of the defendant, was so paid by the plaintiff as *such surety for the defendant, by reason of the non-payment by the defendant of the said rent, and for the costs and charges of an action before then brought against the plaintiff as such surety, by the said *John Inglis*, by reason of such non-payment.

General demurrer and joinder.

Pell, Serjt., in support of the demurrer. The only question is, whether this case comes within the 8th section of the stat. 49 *G. 3. c. 121.*, see *Ante*, p. 552, and the words of the clause clearly do embrace it.

In this case the plaintiff was surety for the defendant at the time of the commission, he then pays the debt under the suretyship, after the issuing of the commission, and before the final dividend; and the plaintiff might have come in and proved his debt under the commission. The case of *Stedman v. Martinant*, 12 East, 664, which was cited in *Vansandau v. Corsbie*, *Ante*, p. 550, and that of *Wood and Another v. Dodgson*, 2 M. & S. 195, which was not cited in that case, bear out the proposition contended for. The object of the act was to confer a benefit on the surety, to enable him to obtain a dividend in respect of his debt; whereas, before the act, the surety would have been compellable to pay the whole amount without any such benefit. [*Dallas*, C. J. The plaintiff here was a surety for the payment of rent, which became due after the bankruptcy. The words of the statute are, "where at the time of issuing the commission any person shall be surety for or be liable for any debt of the bankrupt, it shall be lawful for such surety or person liable, if he shall have paid the debt or any part thereof, &c., although he may have paid the same after the commission shall have issued," to prove under the commission.

*587] Now, is it *possible that this rent, which was not due till after the bankruptcy, can be considered as a debt due at the time of issuing the commission? *Park*, J. There must be a debt due at the time of the bankruptcy to bring the case within the statute; now, here, the rent was not due until after the bankruptcy.] The act steers clear of the difficulty raised by that objection, for the words in the statute are in the disjunctive, they are, "shall be surety for, or be liable for any debt of the bankrupt." The object of the statute must be borne in view; that object was to enable every person who had a demand previously to the distribution of the bankrupt's effects, to come in and prove under the commission. The plaintiff comes immediately within the intention of the act; and if he were to be excluded, the intention of the act must be considered as nullified. An existing debt cannot indeed be shown in this case, but the debt need not be actually existing to bring it within the scope of this act. [*Dallas*, C. J. In *Welsh v. Welsh*, 4 M. & S. 333, the surety in an annuity deed, who had been compelled to pay instalments due after the issuing of the commission,

was held not to be within this section of the act; and it was, therefore, decided that such surety might have his action against the principal for such sums: and Lord *Ellenborough* treated the case as one omitted by the legislature. If the court should differ or doubt in this case, the judgment in *Vansandau v. Corsbie*, argued on *Saturday* last, must be suspended, but, at present, I see no difficulty.]

Vaughan, Serjt., *con'ra*. This case is neither within the words or meaning of the 49 G. 3. c. 121. s. 8. To *bring a case within that act there must be a debt due from the bankrupt at the time of bankruptcy. In [*588 *Inglis v. M'Dougal*, 1 B. Moore, 196, it was held, that though the bankrupt was discharged, the surety for the performance of the covenants was still liable to the principal, and in *Auriol v. Mills*, 4 T. R. 94, it was held that the bankruptcy of the lessee was no bar to an action of covenant brought against him. [*Dallas*, C. J. *Stedman v. Martinnant* goes on the ground that there must be a debt at the time of bankruptcy: in that case the plaintiff had given his acceptance.] *Welsh v. Welsh* is in point. The case of *Wood v. Dodgson* does not apply to this case; the circumstances were totally different. In *Page v. Russell*, 2 M. & S. 551, where the question was as to the liability of a person discharged under the insolvent act to his surety for arrears of an annuity due since his discharge, which the surety had been obliged to pay, *Bayley*, J., in his judgment, says, "in the case of a bankrupt, if the annuity creditor does not come in and prove, but, disregarding the bankruptcy, sues the surety, the surety cannot insist on the certificate: and if he cannot, may he not afterwards resort to the bankrupt? The present is a debt accrued since the debtor's discharge, and, therefore, the plaintiff is entitled to judgment."

Pell, in reply. The act, according to the argument for the plaintiff, embraces no case in which there is not an existing debt from the bankrupt at the time of the issuing of the commission. If the court can see an intention in the legislature, they will effectuate such intention. Now, a man may be surety at the time of the commission, in respect of some liability which does not absolutely attach at the time of the commission, though *it attaches subsequently [*589 thereto; and the intention of the legislature is to reach a case where a person is surety for a debt which may come into existence before the final dividend. In *Welsh v. Welsh*, it does not appear that the plaintiff was called on to pay before the final dividend. The case of *Wood v. Dodgson* was not referred to as a case of similar facts, but for the judgment of *Le Blanc*, J., who could not have contemplated an existing debt; and for the judgments of *Bayley* and *Dampier*, Js., which most strongly support the argument submitted to the court in support of this demurrer.

DALLAS, C. J. We will consider this case: for myself I have no doubt that a debt, to fall within the statute, must be a debt existing at the time of the commission. But though to me the case is clear, (aided moreover as it is by the case of *Welsh v. Welsh*, which is, in my opinion, in point,) I have no objection to the case standing over for a further consideration of the authorities by the court.

PARK, J. I have no doubt upon the point.

BURROUGH, J. Nor have I. The statute throughout is penned with the greatest care, as referring to the *debt* of the bankrupt at the time of his bankruptcy.

Cur. adv. vult

And now,

DALLAS, C. J., informed *Pell*, that the court saw no reason to change the opinion which they had expressed in this case.

Judgment for the plaintiff.

**Ex parte* ST. GEORGE.

[2 Moore 652. S. C.]

A rent-charge, payable to a feme covert for her life, was sold for a valuable consideration by herself and her husband, who received the purchase-money, and both executed a deed of conveyance. The husband was separated from the wife, who was ignorant where he was to be found, although she had made diligent search for him. On an application that the wife might be allowed to levy a fine of the rent-charge without her husband, the court refused to interfere.

HULLOCK, Serjt., moved that Mrs. *St. George* might be allowed to levy a fine of a rent-charge without her husband, to enure to the use of *Andrew Maddocks*, his heirs and assigns. By her marriage settlement, dated 1792, on her marriage with *Thomas Maddocks*, lands were granted to trustees, charged with a yearly rent-charge of 70*l.* to her use for life, after her husband's decease, in lieu of dower. By subsequent indentures, *Thomas Maddocks*, by virtue of a power contained in the marriage settlement, appointed other lands in lieu of those charged in the marriage settlement, and exonerated the lands charged thereby. *Thomas Maddocks* died, leaving *Andrew Maddocks* his heir to the estates thus made subject to the rent-charge. After the death of *Thomas Maddocks*, the widow married *George St. George*; and they, by deed executed by both, and in which there was a covenant for further assurance, assigned the rent-charge for a valuable consideration. She had been requested by *Andrew Maddocks*, who had contracted with the assignees of the rent-charge, for the sale and release thereof to him, to levy a fine *sur concessit* of the same. This she was ready and willing to do; but her husband, *St. George*, was separated from her, and though diligent search had been made, she had been unable to find him, in order to obtain his consent and concurrence with her in levying the fine.

Hullock urged that the husband had by the deed assigned all his interest, and that the fine was only necessary to pass the wife's interest in case of her surviving him; and in support of his application, cited **Moreau's case*, *391] 2 W. Bl. 1205, and *Steal v. Izard*, 1 N. R. 312, admitting, however, that in *Ex parte Abney*, Ante, i. 37, the court refused to interfere.

DALLAS, C. J. In the words of *Mansfield, C. J.*, in *Ex parte Abney*, "Act as you shall be advised; but the court has nothing to do in the matter."

PARK and BURROUGH, J's., concurred.

Hullock took nothing by his motion.

BRANDE v. RICH.

[2 Moore. 654. S. C.]

1. After a rule to plead, and notice of trial given, the court refused to set aside the declaration and subsequent proceedings for irregularity, where one of the counts in the declaration delivered was delivered on unstamped paper.
2. There is nothing in the objection that money counts are partly printed and partly written.

BLOSSER, Serjt., on a former day had obtained a rule *nisi* to set aside the declaration and subsequent proceedings for irregularity, on the ground that one count had been delivered without a stamp; and he at the same time objected that other counts of the declaration, (the common counts,) were partly written and partly printed.

Best, Serjt., showed for cause, that a rule to plead and notice of trial had been given: the application, therefore, came too late, and, if this lapse of time were not fatal to the rule, the plaintiff was ready to strike out the unstamped count, and proceed to trial on the others. The objection to the common counts being in the printed form and afterwards filled up, he treated as hardly deserving a serious answer.

Blosset, in support of his rule, contended that the court would watch for the protection of the revenue; *that the declaration was one entire thing; and, that if the unstamped count were taken out, the declaration would no longer be entire; nor could it stand good on the other counts. [*592]

DALLAS, C. J. No doubt it is the duty of this court to see that the revenue be not defrauded, and to protect the stamp laws. But it is another question, whether we are called on to sanction such objections as these, after a rule to plead and notice of trial given. With regard to the first of these objections, the plaintiff, after withdrawing the unstamped count, may proceed to trial on the remaining counts, each of which is perfect in itself. In the latter objection there is nothing.

Per curiam.

Rule discharged.

ASPINAL v. SMITH.

[2 Moore. 655. S. C.]

Where notice to plead is given, and, before the expiration of the time named in the notice, a judge's order for further time to plead is obtained, such time is to be reckoned from the expiration of the time named in the notice to plead, and not from the date of the judge's order.

BEST, Serjt., on a former day had obtained a rule *nisi*, to set aside, for irregularity, the interlocutory judgment signed in this case.

Pell, Serjt., now showed for cause, that the declaration was delivered on the 11th of *November*, with notice to plead in four days, together with a bill of particulars. On the 13th, in consequence of two summonses taken out and served on the plaintiff, by the defendant, on the 12th, one for delivery of better particulars, and the other for time to plead after such delivery, both parties attended, *Dallas*, C. J., at Chambers, who made an order for delivery of better particulars, and also an order for four days' time to plead after the delivery of such better *particulars. These orders were duly served, and the particulars were delivered on the evening of the 13th. On the 17th, the plaintiff signed judgment for want of a plea. Under these circumstances, *Pell* contended that the judgment was well signed on the 17th. [*593]

Best and *Hullock*, Serjts., in support of the rule, contended that though the order was made on the 13th, the notice to plead would not have expired until the 14th; and that the defendant, therefore, had an additional day under the notice to plead, exclusive of the time ordered; and so the judgment was premature.

And, the court being of this opinion, the rule was made

Absolute.

PARMENTER v. WEBBER.

[2 Moore 656. S. C.]

The lessee of two farms agreed with A. that he should have them during the leases for the same, A. to remain tenant to the lessee during the leases; and at the leaving of the farms A. was to be paid for the fallows and dung. A. took possession, and paid one year's rent growing due after the date of the agreement to the lessee, who afterwards distrained for rent in arrear: Held, that this distress could not be supported, as the agreement operated as an absolute assignment of all the lessee's interest in the farms *

REPLEVIN for taking the plaintiff's goods and cattle. Avowries: First, for a years' rent due to the defendant from the plaintiff at *Lady-day*, 1816. Second, for 42*l.* 10*s.*, the amount of half a year's rent due on that day. Plea in bar to both, *non tenuit*; and issue thereon. At the trial before, Wood, B., at the last *Essex* assizes, a verdict was taken for the defendant on the second avowry for 42*l.* 10*s.*, the value of the goods distrained, subject to the opinion of the court upon a case of which the following is the substance.

*594] "The defendant being in the occupation of two farms, of one as lessee to Lord Petre, and of the other as lessee to the Rev. M. Boskell, on the 20th of September, 1814, an agreement in writing, dated on that day and stamped with a 2*l.* stamp, was entered into between the plaintiff and the defendant, by which "the plaintiff was to have the two farms during the leases of the same, the plaintiff to remain tenant to the defendant during the leases." The agreement then stated the rents, rates, and taxes, and provided, that should the property tax be taken off, it should be taken off from the plaintiff, he agreeing to pay to the defendant 200*l.* for the fallows, dung, and improvements. The defendant was to pay all rates, rents, and taxes up to Michaelmas, 1814, and the plaintiff agreed to farm according to the tenor of the leases, and for every default, to pay according to the forfeiture of the leases. The rent was to be paid half-yearly, at *Lady-day* and Michaelmas. The plaintiff was to take possession on or before Michaelmas-day then next, or to forfeit 50*l.*; and if the defendant refused to comply, he was to forfeit 50*l.* At the leaving of the farms, the plaintiff was to be paid for the fallows and dung. The plaintiff paid the 200*l.* mentioned in the agreement: possession of the farms was given to him by the defendant at Michaelmas, 1814; and one year's rent afterwards growing due, had been paid by the plaintiff to the defendant. It was contended at the trial, that the agreement operated as an absolute assignment by the defendant to the plaintiff of all the defendant's interest in the farms; and that, therefore, the defendant, having no reversion left in him, could not legally distrain.

The question for the opinion of the court was, whether the plaintiff was entitled to recover. If the court should be of that opinion, then a verdict was to be entered for him, with nominal damages; if not, the verdict for the defendant was to stand.

*595] *Best, Serjt., for the defendant. This was an underlease, and not an absolute assignment. The case of ——— v. Cooper, 2 Wils. 375, is inapplicable to the present. That case opens with the fact, that the instrument in question was an assignment, the very point in dispute here. The question resolves itself into the intention of the parties: upon that Ashhurst, J., and Buller, J., founded their opinions in Smith v. Mapleback, 1 T. R. 441. In this case the parties have taken pains to exclude the inference that their intention was, that this agreement should operate as an assignment. If the defendant had intended to assign all his interest in the premises, the relation of landlord and tenant would never have been created as it has been in this agreement; and such relationship is recognised by the payment and receipt of rent growing due after the date of the agreement. The inference which might arise on the first part of the agreement, where the plaintiff is "to have the farms during the

leases of the same," is guarded against by the words immediately consequent thereon, "the plaintiff to remain *tenant* to the defendant during the leases." If this, therefore, be held to be an assignment, it must be so held in defiance of express words creating the relationship of landlord and tenant. The plaintiff, moreover, *at the leaving of the farms*, was to be paid for the fallows and dung. The whole transaction, coupled with the agreement, is clear to show that an underlease of the premises, and not an assignment or surrender of the term, was in the contemplation of the parties.

Blosset, contra, stopped by the court.

DALLAS, C. J. I am of opinion that the instrument in question amounts to an absolute assignment of the defendant's interest in the two farms; and that, therefore, this distress cannot be supported. In the case in *Wilson*, [*596] the defendant avowed under a distress for *rent* due from the plaintiff to him upon an *assignment* of a lease of a term for years to the plaintiff; and the question was, whether that was a *rent* for which a distress would lie? Though there was a rent reserved upon that instrument, the court held that the assignor having granted all his estate in the term, could not distrain; and in giving their judgment, referred to *Brooke's Abridgment*, tit. *Dette*, pl. 39, where the Year Book, 43 *Edw. 3*, 4, is cited for the following proposition: "If a man hath a term for years, and grants all his estate of the term, rendering certain rent, he cannot distrain if the rent be in arrear." I am of opinion that the plaintiff is entitled to judgment.

PARK, J., and BURROUGH, J., of the same opinion.

Judgment for the plaintiff.

CORDWENT v. HUNT.

[2 Moore 660. S. C.]

Plaintiff, lessee of a farm, covenanted with the defendant, his lessor, to fetch and bring all such materials as should at any time during the continuance of the term be wanted in erecting a thrashing mill; which mill the defendant covenanted with the plaintiff to erect during the continuance of the term, for the use of the lessee and the occupiers of an adjoining farm. The defendant pleaded, first, that within a reasonable time from the date of the indenture, and during the continuance of the term, he began to provide the necessary materials for erecting the mill, and whilst he was so doing, the plaintiff desired him not to erect the same, but to refrain from so doing until he should be requested by the plaintiff; and, lastly, a plea of leave and license during the term: Held, on special demurrer, that both these pleas were bad.

The plaintiff declared in covenant, that by indenture of the 27th of *September*, 1813, made between the defendant of the one part, and the plaintiff of the *other part, the defendant demised to the plaintiff certain premises for [*597] nine years next ensuing the 25th of *March* then last past, at a certain rent therein mentioned; and that the plaintiff covenanted, that he would, at his own costs, from time to time, and at all times during the continuance of the term, fetch, carry, and bring all such timber, stone, &c., and other materials, as should, at any time during the term, be wanted in and about the erecting of a new thrashing mill to be driven by water; and that the defendant covenanted, that he would build and erect, or cause to be built and erected, a new thrashing mill or machine to be driven by water, for the purpose of thrashing corn for the use of the plaintiff, in common with the occupiers of a farm called *Speckington Lower Farm* for the time being: that the plaintiff entered and was possessed, and that though he was ready and willing from time to time, and at all times

during the term, at his own costs and charges, to fetch, carry, and bring all such timber, &c., and other materials, as should be necessary for the purpose of erecting the said thrashing mill; yet that after the making of the indenture, and during the term until and upon the 25th of *March*, 1816, when the term so granted, was by mutual consent and agreement between the plaintiff and the defendant surrendered and determined, the defendant, though often during the continuance of the term requested so to do, did not, at any time build and erect, or cause to be built and erected, the said thrashing mill or machine to be driven by water as aforesaid, for the purpose of thrashing corn for the use of the plaintiff in common with the occupiers of *Speckington Lower Farm* for the time being, or in any other manner whatsoever, but wholly refused so to do, contrary to his covenant, &c.: by reason whereof the plaintiff could not, during the continuance of the term, enjoy all the use, *benefit, and advantage from his farm so to him demised, for want of the assistance and advantage of the thrashing mill; and that at the end of the term, certain quantities of wheat by and through the mere want of such thrashing mill, remained in the straw, in the barns of the farm, unthrashed; and that the plaintiff, after the determination of the term, removed the wheat from the demised premises for the purpose of thrashing the same, contrary to the covenant of the plaintiff in that behalf, and by reason thereof the defendant had recovered judgment against the plaintiff, in a plea of breach of covenant, damages 26*l.*; and that the plaintiff was obliged to expend a large sum in defending himself against the said plea.

The defendant pleaded, first, that with all necessary and convenient speed after the making of the indenture, and during the continuance of the term thereby granted, to wit, on the 30th of *September*, 1813, he began to find and provide the necessary materials for building and erecting such new thrashing mill; and that whilst he was finding the materials, and before a reasonable time from the making of the indenture for commencing the actual building and erecting of such thrashing mill had elapsed, and during the term, to wit, on the 30th of *December*, in the year aforesaid, the plaintiff requested the defendant not to build or erect, or cause to be built and erected, the said thrashing mill, but to refrain from so doing, until the defendant should afterwards, and during the continuance of the term, be requested so to do by the plaintiff; and that, in pursuance of the said request of the plaintiff, and in consequence of the plaintiff never having thereafter, and before the surrender and determination of the term, requested the defendant to build and erect, or cause to be built and erected the said thrashing mill, the defendant did, from the time of making the said request, omit to build and *erect, or cause to be built and erected, the same.

Lastly, the defendant pleaded that he committed the supposed breach of covenant above assigned by the leave and license of the plaintiff, for that purpose given and granted on the 16th of *April*, 1814.

To these pleas the plaintiff demurred specially; and showed, for causes of demurrer to the first plea, that the covenant of the defendant in the declaration mentioned was an absolute and executory covenant under seal; and that the defendant had, in his said first plea, pleaded only a parol request or agreement, alleged by the defendant to have been made to him by the plaintiff, to discharge and release the defendant from and against his said covenant, before any breach thereof; and had alleged a request to have been made by the plaintiff to the defendant, that he would refrain from the performance of his said covenant, until he should, at any time afterwards, during the continuance of the term, be requested by the plaintiff to perform the same; and had not shown, nor did it in any manner appear in and by that plea, that the covenant of the defendant was in any way suspended, defeated, released, or discharged, by any deed or instrument under seal; and that the said alleged parol request or agreement of the plaintiff was altogether indefinite, uncertain, and contingent. And the plaintiff showed for causes of demurrer to the last plea, that the said covenant of the defendant was an absolute and executory covenant under seal; and that the

defendant had, in his last plea, pleaded a leave and license alleged to have been first given and granted by the plaintiff to the defendant, before any breach of the covenant; and had alleged, that he did commit the breach of covenant by an alleged leave and license of the plaintiff to the defendant for that purpose first given and granted, before any such breach of the said covenant; and had not shown, nor did it in any manner appear, by that plea, that the covenant of the defendant was in any way suspended, defeated, released, [*600 or discharged, by any deed or instrument under seal.

The defendant joined in demurrer.

Pell, Serjt., in support of the demurrer, contended, that were parties are bound by deed, nothing short of a release by deed, before breach, can discharge them from their respective covenants. The matter pleaded in bar, he urged, was only matter of discharge by parol of an absolute covenant under seal, and before any breach thereof. It could not amount to accord and satisfaction; and even if it did, being before breach it would be equally bad. If the request alleged were proved, it could only go in mitigation of damages, the covenant to erect the mill being an absolute covenant. And he cited *Alden v. Blague*, Cro. Jac. 99, *Carthage v. Manby*, 2 Show. 90, and *Sellers v. Bickford*, Ante, 31.

Best, Serjt., *contra*, did not dispute the authorities, but denied their application to this case. He agreed, that where a thing is covenanted to be done by deed, a plea that the covenant has been waived by parol cannot be pleaded; but where a party has agreed to do any thing by deed, he may, by an agreement to substitute something in the place of such thing to be done, be discharged from doing it. Here the lessor lets an estate to his tenant, and agrees that he will erect a thrashing machine to be used for that farm, and for another farm of the same lessor, and the tenant was to bring the materials. The landlord says, that he was ready to build whenever the tenant would bring the materials, but that he was requested not to build. The lessee might be going out of the estate, and the expenses of bringing the materials might exceed the benefit [*601 which the tenant could derive during his term. There is no time fixed for performance. [*Burrough*, J. It must be done during the term. It has not been done during the term, and that constitutes a breach.] Though the deed cannot be dissolved, a new agreement may be substituted in its place. [*Dallas*, C. J. What then becomes of the case of *Thompson v. Brown*? Ante, vii, 656.] In *Thompson v. Brown*, the contract was varied; but this case is more like that of *Hotham v. East India Company*, Doug. 272. [*Dallas*, C. J. The *dicta* in that case laying down the doctrine for which you cite it, was overruled by the court in the case of *Thompson v. Brown*. Lord Chief Justice *Gibbs*, (after having stated that Lord *Mansfield*, C. J., and *Buller*, J., there say in express terms, that if an agreement had been made in the course of the voyage, that the cargo should be delivered at a different port from that which was stipulated for in the charter-party, and if that substituted contract was performed, the compensation for it might be recovered in an action of covenant framed on the charter-party,) goes on to say, "It is very singular that, in no subsequent case, is that doctrine ever alluded to or introduced, though many cases must have occurred to which it would apply. I can find no judgment of any court, in which the court has referred to those *dicta*." And, after citing many decided cases in opposition to them, he concludes the judgment of the court thus: "Upon consideration of all these cases, we feel ourselves compelled to say, that, notwithstanding the high authority of those *dicta* in the case of *Hotham v. The East India Company*, these cases, in which a *con- [*602 trary doctrine has prevailed, are of higher authority."

Pell, rising to reply, was stopped by the court, who gave

Judgment for the plaintiff.

The Duke of NEWCASTLE, et al., v. CLARK, et al.

[2 Moore 666. S. C.]

Commissioners of sewers have not such a possession in their works as to enable them to maintain an action of trespass against wrong doers; therefore, where the commissioners of sewers brought an action of trespass against the commissioners of a harbor for pulling down a dam erected by the former across a navigable stream, and had obtained a verdict, the court ordered a nonsuit to be entered.

TRESPASS by the plaintiffs, commissioners of sewers for the *Pevensay*, or *Pett Level*, in the county of *Sussex*, against the defendants of *Rye* harbor, in the same county. The first count of the declaration stated, that the defendants on the 22d of *October*, 1816, broke through, cut into, damaged, and weakened one wall, one bank, and one dam or stop of the plaintiffs, (describing the dimensions,) situate at *Rye*, in the county of *Sussex*, in, over, and across a certain channel called *The New Harbor*, otherwise *The Brede Channel*, and took and carried away a great part of the materials coming of the same, viz. bricks, stones, and earth, and converted the same to their own use: by means whereof the wall, bank, and dam or stop severally became exposed to the face and current of the waters flowing and reflowing in the said channel; and thereby the residue of the said wall, bank, and dam or stop, and of the materials composing the same respectively, were washed away, wholly lost, demolished, and destroyed. The second count was, for taking away the bricks, &c. of the plaintiffs.

*603] *Pleas*: *First*, not guilty; issue thereon. *Second*, as to the breaking, &c., in the first count mentioned, and the carrying away of the materials, and as to the taking away of the bricks, &c., in the second count mentioned; that the *locus in quo* is, and at the time when, &c., was an ancient and navigable channel, water, arm of the sea, and highway, within the jurisdiction of the commissioners for executing the statutes relating to the harbor of *Rye*, for all the liege subjects of the king, with their boats and barges, to pass and navigate at their free will and pleasure; that at the times when, &c., the tides and waters of the sea ought to have constantly run and flowed, and still ought to run and flow up, into and along the said channel, &c., and back again over the *locus in quo*, without any bar, hinderance, or obstruction; that the wall, &c., in the first count mentioned, had been wrongfully erected and continued, in, over, and across the said ancient and navigable channel, &c., and that the bricks, &c. in the last count mentioned had been injuriously placed and continued there, by means whereof the king's liege subjects could not pass, &c., with their boats and barges in, over, and along the said channel, &c., as they were before used and accustomed to do, and still of right ought to have done; and that by reason thereof the tides and waters of the sea, which before then had been constantly accustomed to run and flow, and still ought constantly to have run and flowed up, &c., the said channel, &c., and back again, were hindered and prevented from running and flowing up, &c., the same, in their free and natural course; that the wall, &c., in the first count mentioned, and the bricks, &c. in the last count mentioned, being so wrongfully and injuriously erected in, &c., the said channel, &c., three of the defendants, being liege subjects of the king, and at the time when, &c., and still being three of the commissioners duly authorised under the statutes *then in force as to the harbor of *Rye*, and the other

*604] defendants, as their servants, and by their command, by virtue of the powers vested in the commissioners by the statutes, and in order to remove the said obstruction and nuisance, broke through, &c., the wall, &c., and took and carried away the materials coming of the wall, and the bricks, &c. in the last count mentioned, and removed them to a small and convenient distance, doing no unnecessary damage to the plaintiffs on that occasion, &c.

Third. That the *locus in quo* was an ancient and navigable channel and

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highway, for all the king's liege subjects, with boats and barges, to pass and repass at their pleasure; that the wall, &c., were wrongfully erected and continued across the same; and that the defendants being the king's liege subjects, and having occasion to use the said channel, and to pass over the same with their boats and barges at the times when, &c., in order to remove the said obstruction, broke through, &c., the wall, &c., and took and carried away the materials thereof, as in the first count mentioned, and the bricks, &c., in the last count mentioned, to a small and convenient distance, and left the same for the plaintiffs, doing no unnecessary damage, &c.

Fourth. (After stating the wrongful erection in the *locus in quo*, by means whereof the king's subjects could not pass and repass with boats and barges) that the defendants being liege subjects, in order to remove the said obstructions, broke, &c., the wall, &c., and took and carried away, &c.

Fifth. That there was an ancient and navigable channel for the king's subjects, with their boats, &c., to pass, &c.; that the tides, &c., of the seas ought to have run and flowed, and still ought to run and flow up, in, and along it; that the wall, &c., were wrongfully erected near it, and in such a situation, that by reason thereof *the tides, &c., could not flow up and back again, [*605 but were prevented from so doing, by means whereof the navigation of the channel was impeded; wherefore the defendants broke, &c.

Sixth, the same as fifth, describing the channel as an ancient and navigable channel, and common highway, and stating that quantities of water which ought to have flowed into the same were hindered from so doing, whereby it was rendered less commodious.

Seventh and last, similar to the sixth, save that it described the *locus in quo* as a public and navigable channel and highway, (without any mention of water,) that the wall, &c., was erected over and across it, by means whereof the liege subjects, &c., could not pass, &c.; wherefore the defendants broke through, &c.

The plaintiffs, as to the six last pleas, (after protesting that the *locus in quo* at the time when, &c., was not an ancient navigable channel, &c.; and that the tides and waters of the sea ought not to have constantly run and flowed, &c., as in the second plea alleged; and that the *locus in quo*, was not an ancient and navigable channel, &c., as in the third and fourth pleas alleged; and that there was not an ancient and navigable channel, &c., and that the tides and waters of the seas ought not to have constantly run and flowed, &c., as in the fifth plea alleged; and that there was not an ancient and navigable channel and common highway, &c., and that the water of the said navigable channel ought not to have run and flowed, &c., as in the sixth plea alleged; and that the *locus in quo* at the times when, &c., was not a public and navigable channel and highway, &c., as in the last plea mentioned,) replied: that long before the said time, when, &c., and before the making of an act, passed in the 37 G. 3., intituled, "An act for discontinuing the new harbor of *Rye*, in the county of *Sussex*, and for repealing several acts relating thereto, and for *providing [*606 for the discharge of a debt accrued on account thereof; and for making reparation for certain losses; and for the improvement of the old harbor of *Rye*, a certain wall bank, dam, or sluice, called *Winchelsea* sluice, in the said act mentioned, had been made in and upon the *locus in quo*, being within the limits of the levels within the rape of *Hastings*, in the county of *Sussex*, and which said wall, bank, dam, or sluice, continued in and upon the *locus in quo*, until the same afterwards, and before the said time, when, &c., viz. on the 1st of *January*, 1812, was, by the force and violence of the sea, blown up and destroyed; and that the wall, bank, dam, or sluice, from the time of making the same until the granting of the letters patent or commission of sewers thereafter mentioned, dated the 2d of *May*, 51 G. 3., was under and subject to the powers, privileges, and authorities of certain commissioners of sewers, acting under and by virtue of divers letters patent of our lord the now king, under the great seal of *England*, theretofore respectively made according to the form of the

statute, for surveying the walls, streams, ditches, banks, &c. &c., and other impediments, lets, and annoyances within the rapes of *Pevensay* and *Hastings*; and one of which letters patent, or commission, at the time of making the act, was in full force; and that whilst such letters patent were in full force, and whilst the commissioners therein named had such powers, privileges, and authorities over the said wall, &c., called the *Winchelsea* sluice, and after the passing the said act, viz. on the 2d of *May* 1811, the king, by his letters patent, under the great seal of *England* (*profert.*) assigned the plaintiffs and certain other persons in the letters patent mentioned, and any six or more of them, of whom three should be a *quorum*, to survey the walls, streams, ditches, banks, &c., and other impediments, lets, and annoyances within the limits of the levels within the rapes of *Pevensay* and *Hastings*, or on the borders and confines of the same, and the same to cause to be made, corrected, repaired, amended, put down, or reformed, as the case should require, and also to reform, repair, and amend the aforesaid walls, &c., and other the premises, in all places needful, and the same, as often as and where need should be, to make new; which powers and authorities so granted to the said last-mentioned commissioners of sewers are the same powers and authorities as were granted to them under the letters patent, or commission of sewers in force at the time of making the said act. The plaintiffs then averred that the said wall, &c., called *Winchelsea* sluice, having been by the force and violence of the seas blown up and destroyed, as hereinbefore mentioned, six of the persons in the letters patent named, acting on behalf of themselves and the other commissioners of the levels, on the 1st of *September*, 1816, at a meeting duly held, did cause to be made new, erected, and built the said wall, bank, &c., in the *locus in quo*, and also a certain sluice near thereto, the same being then and there respectively needful for the purposes in the said last-mentioned letters patent mentioned, as they lawfully might, for the cause aforesaid, and kept and continued the same erected, until the defendants wrongfully and injuriously broke through, &c., the same: and this, &c. The plaintiffs then newly assigned, that they brought their action against the defendants, not only for the said trespasses above acknowledged by them, but also for that the defendants, on the 22d of *October*, 1816, broke into, &c., the said wall, &c., of the plaintiffs, in the first count of the declaration mentioned, which said wall, &c., of the plaintiffs, had been erected and made by the commissioners of sewers, who for the time being had power, by virtue of a commission of sewers, to make an order for the levels within the rapes of *Pevensay* and *Hastings*; the proprietors of part whereof, at the time of the passing the act, sewed and had a right to sew out their waters at the then mouth of *Rye* harbor, at a time after the passing of the act, when they were obstructed sewing out their waters at the sluice or sewing guts which existed when such act was passed, and which wall, &c., dam or stop, was absolutely necessary for sewing the said waters, on other occasions and for other purposes than in and for the using of the said supposed navigable channel or highway in the said six last pleas, or any of them, mentioned.

Rejoinder. That the wall, &c., in the declaration mentioned, and other the several obstructions and nuisances to the said ancient and navigable channel and highway, water and arm of the sea, in the second, &c., pleas mentioned, and by the replication admitted to be in existence before and at the several times when, &c., had been wrongfully and injuriously, and without the cause in the replication mentioned, erected and built, kept and continued in, over, and across, and otherwise affected, as in those pleas mentioned, the said ancient and navigable channel, &c.; wherefore the defendants committed the acts in those pleas mentioned, as they lawfully might. Issue thereon. Plea to the new assignment, not guilty. Issue thereon.

At the trial of the cause before *Dallas, J.*, at the *Sussex* summer assizes, 1817, the following facts were proved for the plaintiffs. A dam and sluice were

constructed across the *locus in quo* by their order on the same spot where *Winchelsea* sluice, which was blown up, in 1811, and which had been before that time repaired by order of the commissioners of sewers, formerly stood, and soon after its destruction. Before *Winchelsea* sluice was blown up, a loaded barge might have gone up at spring tides as far as *Brede* bridge. The sluice gates were opened at times by the commissioners, when persons who wished to have water let through had obtained leave *from their expeditor, [*609 who had frequently refused to permit loaded barges to go up, and to let the water through the sluice on application made. Though there was a way for a barge to go up where *Winchelsea* sluice stood, it was never intended that it should be navigable after the sluice in question had been completed. Before *Winchelsea* sluice was destroyed, no complaints had been made about the drainage, nor was there any inconvenience for want of a proper vent or flow of water. After *Winchelsea* sluice was destroyed, there was no dam or sluice; the water-course was diminished and gradually silting up; the channel was impeded in the sewage of the levels, which sewage was carried on by different dams and guts, and a great portion of the guts themselves were silted up, and would not act; and if these were cleared out, one tide would fill them up again; the sand and mud could not flow up the channel until it was carried up by the free flow of water consequent on the destruction of *Winchelsea* sluice; no loaded barge could come within a mile and a half of *Brede* bridge, owing to the sand and mud, and at low water a person could have walked across dryfoot, which could not have been done when *Winchelsea* sluice was standing; lands in the neighborhood suffered materially from a greater influx of salt water, and less drainage; and the level had grown gradually worse. *Winchelsea* sluice, was built before *Brick* sluice, which was built in 1766, was pulled up: it was built with wood and brick, and the sides with plank and timber; and there were beams across which prevented barges from going up. *Rye* harbor, was made about the time of building *Brick* sluice, and since that time no barge had gone up. *Rye* harbor, since the destruction of *Winchelsea* sluice, had been growing gradually worse; and opinions of scientific men were given, that if the water were not carried away by means of a *sluice, the harbor would soon be dry from the accumulation of sand and mud, there being no check to the [*610 current of the sea, nor a sufficient fall for the land water without one; and that nothing, save a sluice, could effect the drainage. The new dam and sluice were destroyed in 1816, when nearly completed, in the presence of the defendants; the effect of the new erection was to make the stream run better than before, and was much to the advantage both of the scowage of the harbor and the sewage. Since its destruction all the evil consequences above enumerated, together with others, the result of an imperfect drainage, had been increased. There were remains of old walls in different parts of the levels; if they had been maintained, and the dykes properly kept up and cleansed, they might have answered the purpose of scouring the harbor, and making the land better for a time, but they would not have ultimately prevented the drainage and harbor from becoming worse.

For the defendants, the following facts were given in evidence. *Rye* harbor is of an irregular shape, liable to be impeded from time to time by the shoals thrown up by the flux and reflux of the tide. In 1812, *Scot's float sluice*, which was upon the river *Rother*, was blown up, and the effect was, that the harbor was almost immediately deepened, and the drainage amended. When the sluice was rebuilt, the harbor became choked up, and the drainage was lessened. The same good effects were consequent upon the blowing up of *Winchelsea* sluice, and the same ill effects upon the construction of the dam in question. No sluice exists in the levels drained by the *Thames* and *Medway*, and yet the levels are lower than that in question: the lands are there protected by walls of competent height and dimensions. In the neighborhood of the *Brede* channel, are the remains of *three different sets of marsh walls. In the reign of [*611

Charles the Second, there was a sufficient depth of water for a sixty-four gun ship to come half way up to the town. In 1719, the old harbor was deemed irrecoverable, and incapable of being made fit for the purpose of navigation. In 1743, it was again surveyed, and it was proposed to make the new western outlet. Mr. *Smeaton*, carried the plan into execution, but the dams which he erected caused a bar to be formed, which soon became prejudicial to the harbor and ultimately entirely destroyed it.

Scientific opinions were then given that, if the channel were to have its free course, the whole length of the harbor would be deepened, and that the relief would be more extended, if the sluice were to be discontinued; that the dam was no less prejudicial to the drainage than it was to the harbor; that if a sluice was at all requisite, the best situation to place it would be on a part where two streams are operating in opposition to each other, but that the waters are best left to their own course; that the drainage would have been complete if the marsh walls, the remains of which were visible, had been kept up, instead of having been taken away; and that the mischief was to be traced to their not having been properly secured, and the back drains not having been properly cleansed from time to time. Opinions were then given, in the strongest terms, in disfavor of the dam and sluice system, as applied to harbors, backed by instances of its total failure and injurious consequences. Among other instances, the extensive trial made of it by *Buonaparte*, at *Ostend*, and the abandonment of the work after the expenditure of a million and a half of money was mentioned.

Dallas, J., left it to the jury to consider whether or *not the erecting of the dam and sluice was necessary for the drainage of the lands, telling them, (upon their putting a question to the learned judge, whether the stream was a navigable stream,) that it was no subject for their consideration, whether the stream were navigable or not, for that it was admitted upon the pleadings, that the stream over which the dam was erected was a navigable stream. The jury found a verdict for the plaintiffs, with 666*l.* damages, *Dallas, J.*, having reserved the point, whether the plaintiffs had such a possession in them as would support their action.

Lens, Serjt., in *Michaelmas* term, 1817, had obtained a rule *nisi* to have this verdict set aside, and a nonsuit entered;—or to have a new trial,—or to have judgment entered for the defendants, *non obstante veredicto*; on the grounds, that the plaintiffs had not in them such a possession as would enable them to maintain this action;—that the verdict was against evidence;—and that the plaintiffs had no right to shut up a navigable stream for the purposes of sewage. And, in this term,†

Best, Vaughan, and *Copley, Serjts.*, showed cause; and, being directed by the court to the discussion of the first point, argued, in substance, thus.—“The plaintiffs have in them such a possession as will enable them to sustain the present action. If they are not in a condition to maintain such action, (for it cannot be contended that the possession is in the king, who grants the commission.) no one can maintain it; and the consequence of the latter proposition would be not only to deprive the property *in question of the protection which a right in the plaintiffs to maintain such action would throw round it; but also to deprive of that protection any works erected by them, as commissioners of sewers, for the benefit of the public. If then they have not such right, the destruction of this “wall” (as it is called in the pleadings and proved in evidence,) is a wrong for which there is no civil remedy: and as to a proceeding by indictment, even if a fine were adjudged, and, on petition, the crown in its justice were to apply the fine to the replacing of the damage, the prosecutors would be under the necessity of supplicating for that compensation as a favor which, it is contended, the law gives them as a right. The plaintiffs built this

† The arguments against and for the rule were partly gone through on a former day. The discussion was continued, and judgment given on this day, the 25th of November.

wall, and "A wall doth differ in point of ownership from a bank, first, in respect of the materials the same is made on; for a bank is made *ex solo et fundo quæ ex suis propriis naturis sunt eadem cum terra super qua edificatur*; but so is not a wall, for it is an artificial edifice, not of the materials arising of the place where it standeth, but which be brought thither and built there *ad propria onera et costagia partis*; so that the ownership and property of a wall doth appertain to him 'who is bound to repair the same, though his ground lie not next thereto.†

To maintain trover, an absolute property in the thing sought to be recovered must exist; to maintain trespass, a mere right of possession is sufficient: it can never be said that he who hath the ownership and property of a wall, and who is bound to repair the same, has not a right of possession therein. [Dallas, C. J. Was there not an action of trespass tried at *Maidstone*, with two counts, one for breaking a close, and so forth; and the second for pulling up and taking away a stake put down under an inclosure act, wherein the plaintiff was held *entitled to a verdict on the second count only?] That was the case of [*614 *Driver v. Simpson*,‡ but the rights of the commissioners in this case [*614 are totally different from those of commissioners of enclosure. The latter have only to divide and apportion, and have only a right to go upon the land for the purpose of performing an office. The plaintiffs on the contrary have a right to build dams, banks, and walls, and bring their materials on land for that purpose, so that the nature of their office absolutely requires that they should have possession of the land. But in *Driver v. Simpson*, the commissioners were held to have such a property in the stake put down under their direction, as to entitle them to a verdict for the pulling it up and throwing it away; *a fortiori*, therefore, the plaintiffs have their action for taking and carrying away the bricks, &c. of which their wall or dam was by them constructed. A captain of a ship has a mere naked possession given him by the owner, but he may maintain trespass for injury done to the ship. *Pitts v. Gaince*, 1 Salk. 11., *per Holt*, C. J. A tenant at will may maintain trespass,§ and yet he has so little interest that the lessor or owner may also maintain it. In *Wilson v. Mackreth*, 3 Burr. 1824, the plaintiff had merely the exclusive *privilege of taking turves on part of a common, yet it was [*615 held that he could maintain trespass against those other commoners who [*615 interfered with his right. [Dallas, C. J. There the plaintiff had an exclusive right. In *Stocks v. Booth*, 1 T. R. 428. *Buller*, J., said, that trespass will not lie for entering into a pew, because the plaintiff has not the exclusive possession; the possession of the church being in the parson.¶ Now on these pleadings it is admitted that the *locus in quo* is an ancient and navigable channel and highway, &c. The plaintiffs have erected a dam across this ancient and navigable channel and highway. How then can they have an exclusive possession in this highway, when there is an admitted right of passage in the public?] *Ashhurst*, J., in *Stocks v. Booth*, says, that against a wrong-doer possession may perhaps be *prima facie* a sufficient title; one in possession need not show any title or con-

† *Callis on Sewers*, p. 74. 4th edit.

‡ Argued and decided by the court of K. B. at *Serjeants' Inn*, immediately before this term; not reported.—Trespass by two of the commissioners under an enclosure act against the occupier of land, for taking up a stake which had been put down by their surveyor in progress of the inclosure. First count, for a trespass to the land; second, for taking up and carrying away the stake. It was contended for the plaintiffs, that they had such a possession as entitled them to a verdict on the first as well as the last count. On the first count the verdict was entered for the defendants; on the second for the plaintiffs: the court holding, that though the commissioners had not such a possession as would enable them to sustain the first count, they had a sufficient property in the stake put down under their directions to sustain their right of action on the second.

§ *Rot. Abr. tit. Trespass*, p. 551. n. 2.

¶ [1] *Abbott* C. J., in the case of *Mainwaring v. Giles*, 5 Barn. & Ald. 361, suggests a different reason, viz., "because an action on the case is the proper form of remedy for the disturbance of the enjoyment of any easement, as in the case of a right of way or a stream of water." See also argument of plaintiff's counsel, in *Gay v. Baker*, 17 Mass. Rep. 436.]

sideration against a wrong-doer, *Kenrick v. Taylor*, 1 Wils. 320; and a tenant in common has no exclusive possession, and yet he may maintain trespass against a wrong-doer; now here the defendants are wrong-doers. The wall in question was not completed, and the case is every way much stronger than that of *Harrison v. Purker*, 6 East, 154; and yet in that case, (where the plaintiff, who had covenanted with the owner of the soil to build a bridge for public use thereon, and to repair it, and demand no toll, built the bridge, which was afterwards pulled down,) it was held that the plaintiff could maintain trespass for the materials. A party may have such a possession on a highway as may entitle him to his action of trespass. If a toll-house be necessary for the purpose of collecting the tolls on a road, such toll-house may be built; and if it be injured or pulled down, the commissioners have their action of trespass.

*616] Materials for setting the poor on work *under the stat. 43 *Eliz.* are purchased by money raised by rate: they are not the absolute property of the churchwardens and overseers, and yet they have property in the materials to enable them to protect them from injury. Granting the *locus in quo* to be a navigable stream, the dam erected across it is no nuisance; but it is erected at the costs and with the wages of the commissioners, and in the discharge of their duty under the commission, and because, as they state in their declaration and new assignment, it was needful and necessary. All the acts relating to *Rye Harbor*, and more especially the eighteenth section† of the 37 *G. 3.* recognising the right of the commissioners to make such works and to remove their sluices, treat the works as the property of the commissioners. They are not merely to superintend; they are to *make*. It is admitted as a general principle of law,‡ that where commissioners contract merely for the public service, no action can be brought against them; but the converse does

*617] not at all follow, *viz.* that they are, therefore, not to maintain any *action against those who take out of their possession the fruits of a contract, such as stores, &c. The strongest similarity exists between the plaintiffs and the commissioners of drainage: the only difference between them is, that the former derive their authority from the crown; the latter from an act of parliament. Commissioners of drainage are directed to construct dams, drains, &c.; and persons interfering with their works are liable to an action of trespass. It will not be denied that they are public officers. So are the corporation of the *Trinity House*, who are empowered to erect, maintain, and continue light-houses, &c.; and they may bring trespass for any injury done to such public works. [*Dallas, C. J.* In the stat. 8 *Eliz. c. 13.* there is an express power given to the corporation of the *Trinity House* to bring actions. The commissioners of a dock-yard have a stronger possession than the plaintiffs had of the dam in question; but I never heard of the commissioners of a dock-yard bringing an action for any thing removed from thence.] The property of the royal dock-yards is vested in the crown; but that can never be predicted of the dam in question.

Lens, Blosset, and Taddy, Serjts., in support of the rule, argued thus in substance.

† By which it is enacted, that it should and might be lawful to and for the lords, bailiffs, and jurats of *Romney Marsh*, and the commissioners of sewers for the time being, or such number of them as had power, by virtue of any commission of sewers or otherwise, to make any order for all or any of the levels, the proprietors whereof, or of any part whereof, then sewed or had a right to sew out their waters at the *Camber point*, or the then present mouth of the *Rye Harbor*, at any time or times thereafter, when they or any of them should be obstructed in the sewing out of their waters at the present sluices or sewing guts respectively, to make from time to time any such new cut or cuts, dam or dams, as should be necessary to sew their waters; or to remove their sluices or sewing guts respectively, from the place or places where they then were, nearer to the sea. Provided always that nothing therein contained should extend to enable the said lords, bailiffs, and jurats of *Romney Marsh*, and commissioners of sewers, or any or either of them, to erect, set up, or make any wall, bank, dam, or stop, except only such as should be absolutely necessary for sewing the said waters only, as aforesaid.

‡ *Macbeth v. Haldimand*, 1 T. R. 172.

The plaintiffs are public officers; they exist only as a public body, acting for the public; and in the character of commissioners alone have they any authority to make their works. They act as a court of record; from that court all their orders emanate; they are relieved from all individual responsibility, and subject to no actions. On the instant that they become *functi officio*, they retire to the rank of private individuals, and have no more interest in the works which they have directed in a public capacity, than they may derive from being land owners in the level where they are ordered. *They have no possession whereon to found this action. The passage in *Callis*, cited for the [618 plaintiffs, is decisive of this proposition. A wall, he says, is an artificial edifice, made of materials brought to the spot, and built there, "*ad propria oneru et costagiu partis*." Now this wall or dam was not built at the costs of the commissioners; on the contrary, the workmen who built it would have to proceed in court before the commissioners,† for the recovery of the sum due for their work and labor. The commissioners are not bound to repair the same: they issue their order as a court of record, and levy rates, &c.,‡ for its repair. If the dam in question be treated as a bank; "of a bank the property and ownership is his whose grounds adjoin thereto."—*Callis*, p. 74. In either case the ownership cannot be in the commissioners; nor can they be deemed to have any property in the erection stated to have been injured. "*I. S.* doth cut the sea bank, or the bank of a great river; and *I. B.*, which hath occasion to pass thereby, falleth unawares into the cut, and is hurt in body or goods: the party which cutteth this bank incurreth these mulcts; for, first, the owner of the soil may have his action of trespass *quare solum fodit*, and he which fell therein may have his action upon the case against the digger of that cut, for to recover his damage for his special hurt; and the offender may also be indicted at the king's suit for the general wrong done to the king's people: and the like law is of a highway."—*Callis*, p. 74. The only three remedies are here enumerated: the private actions are sustainable for the private injuries; but the commissioners* have sustained no such injuries. The provisions of [619 the stat. 37 G. 3, are not intended to vest any new powers in the commissioners of sewers, but merely a joint authority and interest with the lords and others of *Romney Marsh*. The cases of *Driver v. Simpson*, *Harrison v. Parker*, and *Wilson v. Mackreth*, are all inapplicable; for the commissioners, it has been shown, have no ownership, as the commissioners of inclosure have in their stakes; neither have they any sinuilla of possession, and much less an exclusive possession. They cannot be likened to the corporation of the *Trinity House*, whose right to sue is given by express words; nor to commissioners of drainage, who derive their rights from express enactments; nor has it ever been determined that the latter may bring an action of trespass. The plain and ordinary course of remedy is by indictment. As to the assertion, that there can be no property without ownership and the possession of some one, a parity of reasoning led to the unsuccessful experiment made in *Russell v. The Men of Devon*, 2 T. R. 667. An injury had happened to the waggon of the plaintiffs in that case, in consequence of a county bridge being out of repair: they reasoned, like these plaintiffs, that there could be no property without ownership and possession; and, as a last resource, brought their action against the inhabitants of the county, as the only persons against whom they could have a remedy: but the court repudiated the action; and *Ashurst, J.*, after commenting on the unprecedented nature of the attempt, said that it was better that the plaintiffs should be without a remedy, than that they should maintain such an action. In *Stocks v. Booth*, the plaintiff showed a sixty year's possession, but that was held an insufficient title on which to maintain

† *Callis*, p. 219. Laborers and others may recover their wages before the justices of sewers.

‡ See *Callis*, p. 219, where the power of the commissioners to take trees for repair is recognised.

his action on the case for disturbance. To maintain trespass, there must not only be a right of possession, but a possession in fact. If land *descends *620] to an heir, before his entry he may make a lease; but he shall not have an action of trespass before entry.† The plaintiffs in this case have not the possession, nor have they even the right of possession; and they cannot, therefore, hold their verdict.

DALLAS, C. J. This is an action of trespass brought by the commissioners of sewers against the commissioners of *Rye Harbor*, for breaking down a wall or dam. The defendants plead, that the wall or dam in question was erected across a navigable river; and, therefore, that they had a right, it being wrongfully erected, to pull it down. The replication states, not denying that the *locus in quo* is a navigable river, that the wall or dam was erected by order of six of the commissioners of sewers, at a meeting duly and lawfully held for that purpose under the commission. Upon the face of these pleadings, therefore, it appears that the act done by the plaintiffs was not an act done by them in their individual character; but, that it was an act done and attempted to be justified under the powers vested in them by the commission. The question, then, is, whether an action of this description, upon an occasion of trespass so as to injure the property, can be brought by these persons, merely in virtue of an injury done to what they have stated to be a public work, erected by them as commissioners.

I have attended, anxiously, during the whole course of the argument; and I have to observe, that there have been no instances referred to, either since the time of *Henry the Eighth*, or before that time, which make it appear that any action of this description has ever been brought; though the occasion for bringing such an action must very often have occurred. The argument *of *621] negative usage, as applicable to this case, if not decisive, is extremely strong. In an action of trespass brought for taking a vessel at sea as a prize,‡ upon the question whether such an action would lie,—first, Mr. Justice *Ashhurst*, and, afterwards, Mr. Justice *Buller*, observed that, inasmuch as there never had been an action brought in such a case, a case which must frequently have occurred if such an action would lie, that circumstances went strongly to show the general notion of professional men to be, that no such action would lie.§ There is no instance, hitherto, of such an action as that under discussion; and the question now arises for the first time, whether or not an action in this form can, in such a case as the present, be supported.

It is not necessary to go into minute distinctions, in this case, between actual and constructive possession. Here, it must be admitted, that the commissioners of sewers had, if any, an actual possession; and it is admitted, for the purpose of raising this point, that the defendants were wrong-doers. Now it is quite clear that the actual possession is sufficient on which to ground an action as against a wrong-doer; for he who commits a trespass upon the possession of another, being himself a wrong-doer, has no right to put the other party to the proof of title. Common sense must show that, in such a case, possession is *prima facie* evidence of title. It must, therefore, be taken that, in this case, the defendants were wrong-doers; which brings us round to the general consideration, whether or not the plaintiffs had such a possession as would enable them, as against a wrong-doer, to bring an action of this description.

*622] That depends, in the first place, upon the character with which the parties are invested; and, in the next, on the consideration of that character with relation to the thing done. It is not pretended that the injury was any injury to them as individuals; or that they had any power of any description, as individuals, over that which constitutes the subject matter of the injury.

† *Plowd.* 142.

Le Comr v. Eden, 2 Dougl. 601.

§ And see the commencement of the judgment of *Ashhurst, J.*, in *Russell v. The Men of Devon*, 2 T. R. 673.

But it is contended merely and simply, that, in the case of a public work of this description, which the plaintiffs employed persons to erect and superintend, if any injury is done to such works, they have a right to bring this action, and recover damages by a verdict, as in the case of an injury done to them as individuals.

In the first place, in what character do they stand? They stand in the character of commissioners of sewers, a character created under a particular commission; a commission given in consequence of an act of parliament delegating to them particular powers. It is said, and I suppose from authority, that these commissioners are nominated by the power of the crown. There is no doubt whatever, that, before the commission, all the powers given to the commissioners were vested in the crown, as far as those powers are incident to, and necessary to the defence of the realm. Without drawing the attention of the bar to any particular expressions in the statute, 23 H. 8. c. 5, by which it appears that these powers were vested in the crown, it is enough to state the recital of the commission. "We, therefore, for that by reason of our dignity and prerogative royal, we be bound to provide for the safety and preservation of our realm of *England*, willing that speedy remedy be had in the premises, have assigned you and six of you," and so forth. The statute first states the want of speedy redress and "remedy, s. 1, in cases of the description [*623 named therein, and then enacts that commissions of sewers shall be directed, in order to prevent any delay in such redress and remedy. Then we have the form of the commission itself; by which those who act under it are clothed with a particular character, and with all that belongs to that character, under the special powers which they are to exercise. Then follows an enumeration of what things the commissioners are authorised to do; namely, all that may be necessary for the defence of the land against the sea, as well as all that may become requisite for draining the lands. The commission prescribes their main duties and powers. They are authorised "to arrest and take as many carts, horses, oxen, beasts, and other instruments necessary, and as many workmen and laborers, as for the said works and reparations shall suffice, paying for the same, competent wages, salary, and stipend, in that behalf; and also to take such and as many trees, woods, underwoods," and, in short, whatever is necessary and proper to construct works for defence against the sea, or for draining the inland country. The commission describes the persons who are to contribute to the charges; and gives the commissioners powers of appointing bailiffs, collectors, surveyors, and other inferior officers. It gives a power of distraining for the arrearages of money assessed; and the particular power to take and employ workmen, timber, &c. which I have already stated at length. Then follow powers to make statutes and ordinances, and to award writs and precepts to sheriffs, bailiffs, and others; to compel others to obey their orders; to command the sheriffs to return before the commissioners to such jurors as shall be expedient for inquiry; and to command "all other ministers and [*624 officers, as well within the liberties as without, to attend on the commissioners in and about the execution of their commission. Then follows the oath, by which the commissioners bind themselves to the faithful execution of their duty. Let us consider what are the terms of that oath:—"Ye shall swear, that you, to your cunning, wit, and power, shall truly and indifferently execute the authority to you given by this commission of sewers, without any favor, affection, corruption, dread, or malice, to be borne to any manner of person or persons: and, as the case shall require, ye shall consent and endeavor yourself for your part, to the best of your knowledge and power, to the making of such wholesome, just, equal, and indifferent laws and ordinances as shall be made and devised by the most discreet and indifferent number of your fellows, being in commission with you, for the due redress, reformation and amendment of all and every such things as are contained and specified in the said commission; and the same laws and ordinances, to your cunning, wit, and power

cause to be put in due execution, without favor, meed, dread, malice, or affection, as God you help and all saints." Not only by the form and construction of the commission itself, therefore, but by the oath which they are to take, the commissioners are faithfully to execute merely the authority which is given to them. It was not intended that they, in the exercise of this authority, having erected works, and those works having been pulled down, should be entitled to bring an action like this. It appears clearly to me, that the power and authority to be exercised by them on behalf of the public, vests in them neither a property nor a possession, which, as a property or possession, can be taken as sufficient to maintain an action of trespass.

*625] It is agreed, that, if the erection in question be a bank, the injury is to the owner of the adjoining land; but, it is said, this is not a bank but a wall. Let us examine, then, the case of a wall as distinguished from the case of a bank. A wall is constructed of materials which do not form part of the soil, but which are brought from a distance, more or less, and put upon the soil; and, in case it is a wall, and not a bank, it is the property, not of the commissioners, but of those who are bound to repair it. There is not any thing, therefore, in substance, from the beginning to the end of the commission, by which it appears that the property, for any purpose, is vested in the commissioners themselves.

It is then said that the commissioners have a power to take timber and other things belonging to any person, for the necessary purposes of constructing and repairing works. But, in such cases, the expense is borne by those who are liable. If the commissioners can sue in the character of plaintiffs, they may be sued in the character of defendants. Now what is provided when timber is taken? If the commissioners take timber belonging to any persons, in order to construct works of any description upon the land of another, the owner of the timber is not to proceed *against* the commissioners; he must proceed *before* the commissioners in court, for the purpose of obtaining his demand for the value of the timber. The price is not given by the commissioners individually, but it is given *before* them as a court of record, in which they are bound to act. The owner of the timber recovers the damages expressly by a decree of the commissioners, they being the persons having the power of finally settling in all cases.

But, it is said, that the commissioners have the power to employ workmen. They have that power, it is true, but their money is not the money which is *626] paid for what is done. The workmen may proceed to recover that which is due for the work and labor which they were hired to do, before the commissioners in their courts. In no case, therefore, is a claim to be made *upon* them with respect to work and labor, or timber; but, in every instance, the plaintiff has to proceed in their court to recover *before* them. If there be in some one or more cases a power and authority to be exercised on the part of the public, those powers are not given to the justices of sewers as individuals, but in their public capacity; and, as commissioners, they can do no act which goes to show either exclusive possession, or any possession of any description whatever. I think, therefore, that in this case there must be a nonsuit.

PARK, J. I should have been contented to have simply expressed my concurrence in the opinion which my Lord Chief Justice has given, had it not been for the great importance of this question to the public. That, and the magnitude of the subject, perhaps, require me to say upon this occasion, more than I otherwise should have said.

This is a civil action, and it is not probable, if it is well founded, that some authority for it should not have been discovered. No such authority, however, appears to have been found. It must be quite impossible, I think, if any one reads what is to be found in the act of parliament passed in the reign of Henry 8., and the powers granted to the commissioners under that act; and

then consults that very learned reading *Callis on Sewers*, which is much regarded as an authority in *Westminster Hall*, not to be satisfied from every passage in that work, that no such action as this can be maintained. 'The commission itself, undoubtedly, gives many powers, *and a considerable authority to the commissioners; but every one must feel, that, in no [*627 part, is it stated, that they are to have any sort of ownership, or any possession or property in the works which they may have to superintend and control. 'The commission at large contains almost every thing that can occur upon such a subject. It constitutes the commissioners a court, and gives them every power incident to a court of oyer and terminer. They may compel obedience to their orders;—they may command the sheriffs by their mandatory writs, to summon a jury of twelve men for the purpose of enquiry;—they are enabled to appoint ministerial officers;—they may nominate a collector for the purpose of collecting money, and proper officers for hearing and taking an account of the receipts and payments. So that the commissioners themselves do not act ministerially, but the officers whom they appoint. Again, the commissioners are empowered to arrest all waggons and so forth; but the charges are not to be paid by the commissioners themselves, for the commission, still treating them as a court, directs that the charges are to be paid by such rates as they, by their ordinance, shall decree. The passage quoted by my brother *Best* from *Callis*, strikes me, as far as it makes against the argument, in support of which it was cited, as almost decisive of the whole case. *Callis* draws a distinction between a wall and a bank; as to the latter the ownership is not doubtful, but as to a wall the ownership is doubtful; and, as a wall is not necessarily the property of the owner of the adjoining land, it is argued that it must be the property of the commissioners. *Callis*, says, "A wall doth differ in point of ownership from a bank, first, in respect to the materials the same is made of; for a bank is made *ex solo*," &c.; but so is not a wall, for it is an artificial edifice, not of the materials arising out of the place where it standeth, but which be brought *and built there, "*ad propria onera et costagia partis*,"—not of the [*628 commissioners; it is not built at their cost,—"so that the ownership and property of a wall doth appertain to him who is bound to repair the same, though his ground lie not next thereto, but, of a bank, the property and ownership is his whose grounds adjoin thereto." The commissioners are not bound to repair the wall; they are to order it to be repaired; but the party bound to repair, is the party who is to pay the expenses of the reparations. This certainly shows that the property of a bank is in the owner of the adjoining land, but that the property of a wall is in him who is bound to repair it, or, in other words, not in the commissioners. But my opinion does not rest upon that passage only, it will be found that the commissioners themselves are not liable, but that they are to make an order upon those who are liable; and, as to possession, there is no mention of it whatever. In *Callis*, P. 115, under the title of ownership, I read, concerning the owner, that, "The ownership of a bank, wall, or other defence, is a sufficient warrant to impose the charge of the repairs thereof upon him, without being tied thereto by prescription, as it appears in 8 H. 7. fol. 5. and it stands with reason that every man should be bound to repair his own; and the consideration is also moving, for that his grounds which lie nearest the waters are sooner subject to drowning, and if any increase be upon the small rivers, it falls to his share." The ownership of a bank or wall then is not in the commissioners. The commissioners are to impose a charge for the repairs; but they are not to impose a charge upon themselves. It is quite manifest, therefore, that the commissioners cannot have the possession. There is another passage which has been *adverted to, P. 219, where *Callis* [*629 shows, that, if the commissioners think it necessary for the purpose of the works that certain things should be got, and that trees should be taken, they may appoint the officers to take so many trees of *I. S.* at such a price, and "*I. S.* hath remedy to come by his moneys in this court;"—that is the court of

the commissioners of sewers. Now did ever any body hear of the judge of a court deciding his own cause? But these commissioners are to decide and give a remedy to the party for the trees admitted to be taken under their authority, or at least by virtue of their authority, they themselves acting as judges. So also, it is expressly pointed out, in the passage which follows, that the laborers and workmen are to recover their wages, not of the commissioners, but *before* the commissioners. In order to save the expense of proceedings at law, parties are enabled to sue in their court, and before the commissioners of sewers, who may give immediate remedy. There is another passage, beginning at page 92, which is extremely strong; for it shows that, if new walls are to be erected, they are not to be erected by the commissioners, but by those owners of the levels who take the benefit of them, and, taking the benefit, are bound to repair and maintain them. The property, therefore, must be in them.

The only further topic of which I shall take notice is the stat. of the 37 G. 3., which has been much relied upon by the bar; but it seems to me that the plaintiffs cannot at all intrench themselves in the eighteenth section. This statute may be described as an act for the preservation of the harbor of *Rye*; and the legislature, choosing to give to the lords, bailiffs, and jurats of *Romney Marsh* certain powers, gave them the powers contained in the act, joining them with the commissioners of sewers. But that statute does not extend the powers *630] of the commissioners of sewers; it only gives to the lords, bailiffs, and jurats of *Romney Marsh* a similar jurisdiction. So anxious was the legislature to guard against misconstruction, that it expressly provides that nothing therein contained should lessen or prejudice the general authority of the commissioners of sewers. The act was not framed for giving the commissioners of sewers any greater authority; but it was framed so, that a much greater authority should be given to the lords, bailiffs, and jurats of *Romney Marsh* than they had before, in case of the lands being endangered.

Under all the circumstances of the case, therefore, there is no foundation for supposing that an action of this sort can be maintained; and I think that to decide in concurrence with what has been brought forward in argument for the plaintiffs would be highly dangerous to their interests. The legislature never contemplated that the commissioners of sewers should have any other authority than that of guarding against any injury on the part of the public; and, if any injury arose from the cutting down the dam in question, that remedy must be by indictment in the name of the king, and not by an action brought by the commissioners as individuals, for the wrong done. If the proceeding by indictment had been adopted, it would have afforded the opportunity of administering justice, by keeping the fine impending over the party until the damage was duly repaired. Under these circumstances, I am of opinion that this verdict cannot be allowed to stand.

BURROUGH, J. This question is raised upon the general issue: the plaintiffs, therefore, must have the possession, or they cannot maintain this action. It is not necessary for me to state what is the case of commissioners of inclosure, *631] because it must be remembered that they act ministerially. In many acts those commissioners interfere personally, and many things are carried on under their immediate direction; and a question in such cases may be raised, whether they may not have a constructive possession; but that is not now to be decided: such a question can never be made a part of the present case. The case of *Driver v. Simpson* was so very peculiar in its nature, and depended so entirely upon particular circumstances, that the gentlemen who took the note of it did not think it worth reporting; and, besides, it has no bearing upon the present question. My Lord Chief Justice has truly observed that, as there has been no instance of such an action, it is a strong presumption, under the circumstances of this case, that no such action could be maintained. An act of parliament was made in the year 1531, previously to which the commissioners of sewers had

a regular jurisdiction of oyer and terminer, which they had been accustomed to have at all times. In this case, whether, the defendants are wrong doers or not, is not the question. The question is: against whom are they wrong doers? Are they wrong doers against the plaintiffs? Certainly not, unless the plaintiffs can be said to be personally in possession, or have a right to the property, in respect of which possession follows; for without that they cannot maintain their action. They must either have the actual possession or the general property, which brings possession to them. Now, let us look for a moment at the situation of the commissioners, and see whether, in any possible case, the possession can be in them. The commissioners are clothed with no individual rights as a consequence of their office—they act in their official capacity only. They are persons holding a court of record; they act by their servants, and all they do is done under the sanction of the court. How is the act of parliament worded, under which they are constituted commissioners? It is in very strong terms: [*632 the commissioners are said to be the king's justices, which shows very plainly what we are to understand by the commission. The business of the court is to be settled by six of the commissioners, three of whom must be of the quorum. They are justices, and are to do those things which are pointed out; but all still with reference to a court of oyer and terminer existing at all times. Let us look at the acts which the commissioners are to perform. They are to survey the things under their care; and when they come back from their survey, their proceedings are taken by the commissioners as a court. If they are to survey, they are also to inquire by the oaths of honest and lawful men, who are to present what things are necessary to be done. Then the commissioners are to make a decree, and issue their orders, which they are authorised to carry into effect by their keepers, bailiffs, expenditures, and other officers, as ministers. They have duties assigned to them: but for what purpose? For the safety, conservation, reparation, and reformation of the premises—all that is to be actually done is done by the machinery of the persons appointed by the commissioners. The commissioners are to hear the accounts of the collectors or other ministers as to receipts and payments: all this shows that, in their administration, the commissioners themselves form a court of justice, and that they carry their decrees into effect by means of their officers. Now, I would ask if there has ever been an instance of an action brought by any one against a judge of a court of record for any thing done in a judicial capacity? It is impossible. Never can such an action have existed. I remember very well the case of *Miller v. Scare*, 2 W. Bl. 1141, *which [*633 was an action brought against commissioners of bankrupts. There a distinction was made, that the commissioners of bankrupts had a ministerial authority, and did not form a court of record. Various distinctions had been drawn upon the subject; but that case put all questions to rest. Then it is said that the plaintiffs are only commissioners of a particular district; but, look at the statute, and the answer is plain. The statute says, that by reason of the outrageous flowing of the sea, it was necessary that commissions of sewers should be directed from time to time *in all parts of the realm*. They are not appointed for any particular district; the commissions are issued because there is found great want of them, from the breaking and irruptions of the sea, by means of which the low lands are destroyed. Beyond all question these commissioners are invested with a great public authority. They are to be named, not in the ordinary way under an inclosure act, but by the Lord Chancellor and Lord Treasurer of *England*, and the two Chief Justices for the time being, or by three of them, whereof the Lord Chancellor to be one. Under these circumstances, can it be contended, that the commissioners have the possession of these works. Is there any pretence for supposing that they can have such a possession as will maintain this action? They are not in a capacity to have the possession, being a court of record. To what end should they have the possession, when every thing they do, is by the machinery of those whom

they appoint? From the words of the statute of *Henry* the Eighth, I have not the least doubt upon the question: and I am of opinion that this action cannot be maintained,

Judgment of nonsuit.†

† [See *Dyson et al. v. Collick*, 5 Barn. & Ald. 600.]

*634]

*JONES v. TATHAM.

The court refused to grant a new trial in an action of trespass, on the ground of a variance between the *nisi prius* record and the issue delivered; the mistake being in the issue, and the record agreeing with the declaration.

TRESPASS for breaking and entering the close of the plaintiff, for whom, at the trial at the last *Gloucester* assizes, the jury found their verdict.

Heywood, Serjt., on a former day, obtained a rule *nisi* to set aside this verdict and have a new trial, on the ground that the *nisi prius* record described the *locus in quo* at *Cheltenham*, as abutting on the lands of *William Fowler*, but the issue delivered, described the abuttal by mistake to be on the lands of *William Fowles*.

Best, Serjt., submitted, that there was no ground for the motion, because the declaration was right, and the record agreed with the declaration, the mistake being in the issue delivered.

Heywood, in support of his rule, contended that as the trial had, was on a *nisi prius* record, which is not the copy of any record in court, there must be a new trial.

Sed non allocatur; for the issue delivered is no record, and being incorrect, the defendant need not have accepted it. The declaration was right, the issue is a copy of the declaration, and on application to a judge, it would have been instantly corrected.

Per curiam.

Rule discharged.†

† Note. See *Doe dem. Cotterill v. Wylde* 2 B. & A. 472.

*635]

*PARKER v. EASTWOOD.

In an action directed by the Vice Chancellor to try the validity of a commission of bankrupt, it being sworn by the defendant, without contradiction by the plaintiff, (the bankrupt,) who had laid the venue in *Middlesex*, that previously to the issuing of the commission the plaintiff had resided in *Yorkshire*, that all his dealings had taken place in *Yorkshire* and its vicinity, and that all the defendant's witnesses resided there, and the plaintiff not having disclosed by affidavit that he had any material evidence to give in *Middlesex*, the court allowed the defendant to change the venue to *Lancaster* on payment of costs.

HULLOCK, Serjt., on a former day in this term, had obtained a rule *nisi* to change the venue in this cause from *Middlesex* to *Yorkshire* or *Lancaster*, on an affidavit which stated, that a commission of bankrupt had issued against the

plaintiff, who afterwards petitioned that the commission might be superseded, and that the Vice Chancellor, before whom the petition was made thereupon, directed, that, for the purpose of trying the validity of the commission, the plaintiff should bring an action against his assignee, and that he should admit possession of the plaintiff's effects; that this action was accordingly brought, and the *venue* laid by the plaintiff in *Middlesex*; that the plaintiff, before the issuing of the commission, resided in *Yorkshire*, and that all his business was transacted, and his effects got in from persons in that vicinity; that the plaintiff would have nothing to prove, and that all the *onus* of proof would lie on the defendant, whose witnesses resided in *Yorkshire*; that the expenses of their attending in *Middlesex* would be heavy, and that the costs would fall on the defendant, the estate of the bankrupt being under 300*l*.

Vaughan, Serjt., now showed cause against the rule, and contended that the plaintiff had a right to retain the *venue* in *Middlesex*, on undertaking to give material evidence there. *Henshaw v. Rutley*, 1 N. R. 110.

*DALLAS, C. J., (stopping *Hullock*, who rose to support his rule.) [*636] The case of *Henshaw v. Rutley*, was prior to the cases subsequently determined in this court. If the plaintiff had material evidence to give, he should have disclosed it by affidavit in answer to this application. It is sworn without contradiction, that all the defendant's witnesses live in *Yorkshire*, and the plaintiff does not swear that he has any witness at all.

PARK, J. In the case of *Holmes v. Wainwright*, 3 East, 329, the Court of King's Bench changed the venue, on the application of the defendant, on his agreeing to admit a particular fact which existed in point of form in the original county in which the venue was laid, all the witnesses residing at a great distance from that county. The words of Lord *Ellenborough* in that case are, "Here all the witnesses live at a great distance, and the expense of bringing them up must be very great, and there is no convenience balancing on the other side." I think the defendant is entitled to his rule.

BURROUGH, J., concurred.

Per curiam.

Rule absolute to lay the venue in *Lancaster* on payment of costs.

*AMES et al., v. MILWARD.

[*637]

[2 Moore 713. S. C.]

The arbitrator, to whom an action on the case for a fraudulent representation of the circumstances of *A.* was referred, found that the defendant, knowing the object of the plaintiffs' inquiries, had omitted to state the material facts of the existence of debts due by *A.* to him, and of his, holding *A.*'s warrant of attorney, and that therefore, he did not give a fair representation of what he knew concerning *A.*'s credit; and that the defendant, although he did not mean to hold out any inducement to the plaintiffs to trust *A.*, thereby misled the plaintiffs, and created in them a false confidence in the circumstances of *A.* The arbitrator acquitted the defendant of all collusion with *A.*, and of all fraud at the time of making the representation, but feeling himself compelled by adjudged cases, which he mentioned, to decide that the knowledge of the falsehood of the thing asserted was in itself fraud and deceit, he awarded in favor of the plaintiffs. The court set aside the award, on the ground that the arbitrator had, on the face of it, acquitted the defendant of fraud and deceit.

ACTION on the case, for a fraudulent representation. The arbitrator, to whom the case was referred, stated in his award the following facts. The plaintiffs were distillers at *Birmingham*, and the defendant was a malster of the same

place. Towards the end of 1815 and in the beginning of 1816, they had trusted *Willam Bate*, who kept a public house in *Birmingham*, with divers quantities of malt, and had agreed to extend his credit to 250*l.*, to secure which sum with interest the defendant took *Bate's* warrant of attorney on the 20th of *January*, 1816; and between that time and the *September* following, delivered other quantities of malt, which made up the 250*l.* It was intended between *Bate* and the defendant, that *Bate* should be intrusted with this amount at interest, and that he should for the future pay for one delivery of fifty-six bushels of malt under another. On the 24th of *February*, 1817, *Bate*, besides the debt of 250*l.* was in arrear 32*l.* 4*s.* on account of a further supply; and on that day, he had at his request fifty-six bushels more of malt, the amount of the price of which he promised to pay, as well as the 32*l.* 4*s.* after *Whitsuntide* fair, with which promise the defendant was contented. On the 24th of *March* following,

*638] *Bate* ordered fifty-six bushels more, which he at the same time paid for, *(minus 16*s.*) The account between the defendant and *Bate* being in this state, (namely, the debt of 250*l.* resting on the security of the warrant of attorney, and a further debt of about 63*l.* on his undertaking to pay after the next *Whitsuntide* fair,) the plaintiffs, about three weeks before *Whitsuntide*, applied by their traveller to the defendant, to know the character and responsibility of *Bate*, and the defendant being informed by the traveller that *Bate* had given a reference to him, as to his (*Bate's*) responsibility, and being asked what he thought of *Bate*, replied, "he pays me very well;" and to another question, whether he would trust him with malt, he replied that he would. This communication passed in the street, where the defendant and the plaintiff's traveller accidentally met. In consequence of what the defendant there stated, the plaintiffs delivered to *Bate* a quantity of spirits to the amount of 50*l.* 18*s.* The plaintiffs had previously credited *Bate* with two gallons of brandy, ordered of their same traveller, who admitted that he had often pressed *Bate* for orders, considering his house well situated for business, and that knowing the family, he was anxious to do business with *Bate*. It was proved, however, that one of the plaintiffs in person refused to trust *Bate* with this larger order without a reference. After *Whitsuntide* fair, *Bate* failed to pay the defendant according to his promise; and, in the second week after the fair, *Bate* having again applied to the defendant for more malt on credit, he refused to trust him further, and very shortly afterwards entered up judgment on the warrant of attorney, and executed it against the goods of *Bate*. The execution was set aside by a commission of bankrupt founded on a previous act of bankruptcy. The arbitrator then stated, that he had been induced to state the facts, and also to give the

*639] grounds and reasons of his decision on account of the doubts and *different opinions entertained by the judges respecting actions of this nature, and then proceeded as follows. "My decision and award is, that the defendant knowing the object of the inquiries made of him on the part of the plaintiffs, took upon himself to answer, but omitted to state the material facts of the debts which *Bate* owed to him, and that he held *Bate's* warrant of attorney for 250*l.*, wherefore the defendant did not give a fair representation of what he knew concerning *Bate's* credit, and which facts, if they had been stated, would have given a different color to the transaction. In what the defendant did say, I think he meant not to hold out any inducement to the plaintiffs to trust *Bate*, but to confine his information to the questions asked, and inasmuch as he said concerning *Bate*, "he pays me very well," he spoke truth with reference to the particular agreement between himself and *Bate*, but as he never disclosed the terms of their dealings, and the security he held, he thereby misled the plaintiffs, and created in them a false confidence in the circumstances of *Bate*. I acquit the defendant of all collusion with *Bate*, and of all premeditated fraud, with a view to benefit himself at the plaintiff's expense, by subjecting their goods to his execution; and I acquit him of any intention at the time of making this representation, of withdrawing his credit from *Bate*, but I am compelled by the

authorities cited in the margin.† to decide in this case, that the knowledge of the falsehood of the thing asserted is fraud and deceit, and that the assertion of the defendant, that *Bate* paid him well, was not true in the obvious sense of the words; that the defendant *was bound, if he answered at all, to state all he knew, and that he omitted to disclose important circumstances directly [*640 within his own knowledge; and that the suppression of facts of such different import, and so material as those which the defendant did not choose to communicate, is equally evidence of fraud and deceit." And he then awarded the sum of 50*l.* 18*s.* to be paid by the defendant to the plaintiffs at a certain time and place in the award mentioned, &c.

Copley, Serjt., on a former day, had obtained a rule *nisi* to set aside this award, on the ground that the arbitrator had on the face of it mistaken the law of the cases referred to; and that his adjudication was wrong, being in the teeth of his own opinion, acquitting the defendant of fraud or an intention to deceive. And now,

Lens, Serjt., showed cause against the rule. Though the reasoning, as it appears in the award, may militate against the decision to which the arbitrator has come, yet if his conclusion be correct, the court will not enquire into the nature of the premises, by which he arrived at that conclusion. [*Dallas*, C. J. 'This is an action founded on fraud and deceit; the arbitrator expressly says, I acquit the defendant of fraud; was there ever an instance where this action has been supported without circumstances of fraud on the part of the defendant?'] The arbitrator indeed acquits the defendant in one place, but he convicts him in another; he has been inconsistent and wavering in his opinion, but his last conclusion is in conviction of the defendant. If there is a voluntary misleading, that is a fact from which the jury may draw the inference of fraud. 'There is no occasion to prove that the person represents with a view to his own interest; if he has a *different feeling in his own mind from that which he wishes [*641 to excite, or if he keeps back a circumstance which would alter the impression which he seeks to give, that will be sufficient. In *Haycraft v. Creasy*, the defendant was himself the dupe of appearances. [*Dallas*, C. J. Where a person misrepresents for the purposes of deception, the action is maintainable; but, here, the defendant is acquitted of fraudulent intent; his representation to the plaintiff is a mere naked falsehood. If a jury had acquitted the defendant of all fraud or wilful intention to mislead, but had found their verdict for the plaintiff, would such a verdict carry damages? Now the words of the arbitrator here are, "I think he meant not to hold out any inducement to the plaintiffs to trust *Bate*." *Burrough*, J. The words of Mr. Justice *Le Blanc* in *Haycraft v. Creasy* are, "By fraud, I understand an intention to deceive; whether it be from any expectation of advantage to the party himself, or from ill-will towards the other, is immaterial." In the case before the court, the defendant's representation had the effect of inducing the plaintiffs to trust *Bate*, though it is expressly found that the defendant did not mean it to produce that effect.] The arbitrator says, that he is bound by the cases cited by him, to say, that this representation of the defendant is a fraud; and though those cases make against his opinion, and his reason for his decision may be foolish, the court will not on that account set aside his award, if he is right in his conclusion.

Copley, who rose to support the rule, was stopped by the court.

DALLAS, C. J. If this award be set aside, the plaintiffs will not be without their remedy. It is stated that the arbitrator has gone backwards and forwards in his *opinion, but that at last he is right: now I think that he was decidedly [*642 wrong. These actions ought not to be encouraged. I do not conceive that where, in substance, a man answers fairly, and does not impart all he knows, it necessarily follows that he intended fraud. The ground of the action is fraud;

† *Pasley v. Freeman*, 3 T. R. 51. *Haycraft v. Creasy*, 2 East, 92. *Eyre v. Dunsford*, 1 East, 318. *Tapp v. Lee*, 3 Bos & Pul. 367.

the words used in framing the count are, that the defendant, intending to deceive and defraud the plaintiffs, &c. did falsely, deceitfully, and fraudulently assert, &c. 'This the arbitrator expressly negatives. What then is fraud? In the words of Mr. Justice *Le Blanc*, it is "an intention to deceive." Now how is it possible to support an award against a defendant, in an action of this kind, where he is acquitted of all intention to mislead, and of all premeditated fraud?

PARK, J. In *Pasley v. Freeman*, great objections were made to this action, the novelty of which is within all our recollections. Mr. Justice *Le Blanc's* opinion in *Haycraft v. Creasy*, gave universal satisfaction. The conclusion to which the arbitrator has come in this case, is quite absurd. He says, I think he is innocent, and then awards against him.

BURROUGH, J. 'This action could not be maintained without such evidence as would induce the jury to find fraud; and that the arbitrator has negatived.

Rule absolute.†

[† See 3 Johns. 271, *Ward v. Center*, 6 Johns. 81, *Upton v. Vail*, 8 Johns. 23, *Young et al. v. Covell*.]

•643] •JACKSON v. Lady CHAMBERS and AMES.

[2 Moore 718. S. C.]

Trespass against two defendants: one suffered judgment by default, and a writ of inquiry was executed against him. The plaintiff entered a *nolle prosequi* as to the other, who, after a lapse of two years, was held to be entitled to costs under the statute 8 Eliz. c. 2. s. 2.

AN action of trespass had been brought by the plaintiff against the defendants. *Ames*, suffered judgment to go by default, and a writ of inquiry was executed against him thereon in *Trinity* term, 1816; whereupon the plaintiff entered a *nolle prosequi* as to *Lady Chambers*.

Onslow, Serjt., on a former day, had obtained a rule *nisi* for the plaintiff, to pay to *Lady Chambers*, her costs, under stat. 8 Eliz. c. 2. s. 2. relying on the case of *Cooper v. Tiffin*, 3 T. R. 511.

Vaughan, Serjt., now showed cause. Two years have elapsed since the point of time when the application might have been made, and it now comes too late. In *Cooper v. Tiffin*, there was only one defendant: but, in *Harewood v. Matthews*, 2 Tidd. 724., 6th edit., one of two defendants pleaded his bankruptcy to an action of assumpsit against both, and, as to him, the plaintiff entered a *nolle prosequi*; but proceeded to trial, and gained a verdict against the other, who had pleaded the general issue. There the court held that the former defendant was not entitled to costs.

DALLAS, C. J. (Stopping *Onslow*, who rose to support his rule.) How, brother *Vaughan*, can that case be made to apply to the present? 'The information, on *644] *which the plaintiff entered his *nolle prosequi* in *Matthews v. Harewood*, came from the defendant himself, who pleaded his bankruptcy, a fact of which the plaintiff could not be supposed to be cognisant without such information. But, here, the plaintiff makes *Lady Chambers*, a co-defendant, and by the course which he adopts, virtually acknowledges that she was not guilty of the trespass with which he has charged her; a fact which must be taken to have lain within his own knowledge.

Per curiam

Rule absolute.

WATKINS v. WOOLLEY.

[2 Moore 719 S. C.]

Where the declaration filed in the office before the defendant's appearance, was indorsed as filed conditionally, and the notice served on the defendant was of a declaration generally, the court refused to set aside the proceedings for irregularity.

THE notice of declaration served on the defendant in this case was to appear and plead in four days. In the office the declaration was indorsed as filed conditionally.

Vaughan, Serjt., on a former day had obtained a rule *nisi* to set aside the proceedings for irregularity, on the ground that the notice served was a notice of declaration in chief, and not *de bene esse*, and that being before appearance, the defendant might treat it as a nullity, and was not bound to plead. And now,

Lens, Serjt., showed cause, and contended that the notice served, being of a declaration generally, the defendant was bound to have searched the office, where he might have seen that the proceeding was *regular, and he cited *Cort v. Jacques*, 8 T. R. 77, as in point; and referred to the case [*645 of *Chanklin v. J'Anson*, Barnes, 298, 3d edit.

Vaughan, in support of his rule, contended that the defendant was not called on to take the declaration out of the office, and so to waive the advantage which the irregularity of the plaintiff ought to give him; but that he had a right to stand on his notice, which in effect called on him to come into court, and plead before an appearance had been entered.

DALLAS, C. J. In this case the notice served was of a declaration generally, and I am of opinion, that it lay on the defendant to enquire whether it was a declaration filed conditionally. An enquiry at the office would have shown him that the proceeding was regular. The facts of the case of *Cort v. Jacques*, are similar to those of the present case, and I am of opinion that this rule must be discharged.

Per curiam.

Rule discharged.



SHAW, Demandant; SPENCE, Tenant; HUNT Vouchee.

[2 Moore. 721. S. C.]

The court will not alter that which is the deed of the party. Therefore, where the vouchee in a recovery had signed his name to the deed to make a tenant to the *præcipe* the court refused to amend by allowing the insertion of an additional baptismal name.

It appeared on affidavit, that the vouchee in this recovery, which was suffered at bar in *Trinity* term, 57 G. 3. was commonly known by the name of *James Hunt*; *and that he had so assigned his name to the deed to make a tenant to the *præcipe*. On the back of the deed was an indorsement, [*646 stating, that though the vouchee was called by the name of *James Hunt*, his name was *James Edward Hunt*, which last was his baptismal name; and

Blosset, Serjt., now moved to amend this recovery, by inserting the word *Edward*, between the words *James Hunt*. He cited *Chapman v. Bacon*, Pig. on Recov. 170. *Mayre*, demandant, *Coulthard* tenant, *Goodwin*, vouchee, 2 W. Bl. 1230. *Lord* demandant, *Biscoe* tenant; *Ayles*, vouchee, Barnes,

24, relying mainly on the case of *O'Brien*, vouchee, Ante, iv. 196, where the court gave leave to amend the warrant of attorney, by inserting the word *Glanville*, between the words *Lancelot O'Brien*, on an affidavit of the vouchee, that he added this name, upon the authority of an old family bible, in which it was inserted soon after his baptism.

DALLAS, C. J. It ought to be distinctly understood, that the court will in no case alter that which is the deed of the party. This was laid down upon the fullest consideration, in two cases in 6th Taunton,† and we decided on the same ground yesterday.

BURROUGH, J. I think the recovery stands much better as it is. If the vouchee is known by the name of *James Hunt*, I do not see that there is any difficulty. But if the recovery and the deed which now agree, be made at variance by the insertion of this name, it appears to me that a difficulty may be created.

Blosset then withdrew his motion.

† *Forster*, Demandant; *Forster*, Tenant; *Darcy Bolton and Wife*, Vouchees, Ante. vi. 373. *Fox*, Demandant; *Bembow*, Tenant; *Earl Gower and Others*, Vouchees, Ante. vi. 652.

*647] *DOE, on the demise of SPENCER et al., v. WANT et al.

[2 Moore 722. S. C.]

An affidavit, intituled *A. against B. and another*, is bad; for the defendants should be described by their christian names and surnames.

Vaughan, Serjt., on a former day, had obtained a rule *nisi* for entering up judgment, as in case of a nonsuit, for not proceeding to trial pursuant to notice, on affidavits intituled as above.

Lens, Serjt., now showed cause, and contended that the application could not be supported on affidavits so intituled. The christian and surnames of the defendants should have been inserted, *Fbres v. Diemar*, 7 T. R. 661. If an affidavit be filed without title, the court cannot take notice of it, though the adverse party be willing to waive the objection. *Owen v. Hurd*, 2 T. R. 643.

Vaughan, in support of his rule, contended that the affidavits were sufficiently intituled.

The court discharged the rule with costs.

Vaughan, then urged as another ground, that *Phillips* the other defendant was dead. *Sed non allocatur*.

*648] *TAYLOR, Assignee of M·MICHAEL, a Bankrupt, v. ROBINSON et al.

[2 Moore 730. S. C.]

The defendants, on the 15th of *October*, as brokers of *M.*, purchased, by his advice, and on his account, goods of *D. & Co.*, and agreed with them that the goods should remain on the premises of the latter for one month rent free; and that *M.*, after that time, should pay for the room they should occupy, until their removal. The invoice was

made out to *M.* From the 7th to the 11th of *November*, the defendants shipped part of the goods by order of *M.*, who directed that the residue should be left on the premises of *D. & Co.* till further orders from him. The defendants soon afterwards were requested by *D. & Co.* to remove the residue of the goods, but the defendants did not then comply with that request. A docket was struck against *M.* on the 6th of *December*; and on the 9th and 10th of that month the defendants, without any order from *M.*, removed part of the residue to their own premises. On the 10th a commission of bankrupt issued against *M.*: the court held that the defendants had no possession on which to found their claim, as brokers, to a lien on the goods so purchased.

TROVER, for *Quebec* staves. One count of the declaration laid the property in the bankrupt before his bankruptcy; the other laid the property in the plaintiff, as his assignee. Plea, not guilty. On the trial before *Bayley, J.*, at the last *Lancaster* summer assizes, the following facts were proved. The bankrupt *M. Michael*, was a merchant resident at *Bristol*; the defendants were employed as his brokers and factors, in making purchases for him at *Liverpool*, the place of their residence, and had sold him goods on their own account. On the 15th of *October*, 1817, the defendants, by advice from *M. Michael*, purchased of *Duncan and Fletcher* at *Liverpool*, a large quantity of *Quebec* staves for 946*l.*, and at the time of purchase, they stipulated with *Duncan and Fletcher* that the staves should remain in the yard of the latter, free of rent for one month from the day of sale, and that after that period, *M. Michael* should pay a penny per square yard per week for the room they should occupy, until removed. The invoice was made out to "Mr. *M. Michael*, per Messrs. *Robinson*: bought of *Duncan and Fletcher*." Previously to this time *M. Michael* had become indebted to the defendants for goods sold by them to him on their own account. On the 25th of *October*, the defendants received from *M. Michael* a banker's bill for 900*l.* at thirty days' date, payable to his order, and indorsed by him to the defendants. The defendants immediately indorsed and paid it over to *Duncan and Fletcher*, in part payment for the staves, and promised, in conversation with *Duncan and Fletcher*, to pay to them the residue, and such yard rent as should be due under the stipulation, on their removal. From the 7th to the 11th of *November*, the defendants shipped for *Bristol* about one half of the staves, by order of *M. Michael*, who directed that the residue should not be shipped without his further orders, and the residue, therefore, remained in the yard of *Duncan and Fletcher*. Subsequently to the last shipment, the defendants received no further orders from *M. Michael* concerning the staves; but about the end of *November*, they were pressed by *Duncan and Fletcher* to remove their staves, as *Duncan & Co.* wanted the yard room. On the 6th of *December*, a docket was struck against *M. Michael*. On the 9th, the defendants, without any order from him, applied to *Duncan and Fletcher* for the residue of the staves, and on that and the following day, removed more than one-half of the residue, worth about 350*l.*, and placed them on their own premises. On the 10th, (the day on which the defendants removed the last lot,) a commission was issued against *M. Michael*, founded on acts of bankruptcy, committed in the preceding months of *October* and *November*. For the defendants it was contended, that they had such a possession of the staves as gave them a lien for their general balance. *Bayley, J.*, was of opinion, that the possession was in *M. Michael*, and not in the defendants, and of that opinion were the jury, who found a verdict for the plaintiff, with leave by the learned judge to the defendants to move to set it aside. Accordingly,

Hullock, Serjt., on a former day, had obtained a rule nisi to set aside the verdict, and enter a nonsuit, contending that actual possession was not the necessary foundation of lien. And he cited *Man v. Shiffner*, 2 East, 523, and *Godin v. The London Assurance Company*, 1 Burr. 489. And now,

Copley, Serjt., showed cause against the rule, and contended, that the plaintiff was entitled to recover, the defendants never having had actual possession of the staves until after the bankruptcy, and actual possession being necessary

to give to brokers and factors a lien for their general balance. *Kinloch v. Craig*, 3 T. R. 119. 783.

Hullock, in support of his rule. The defendants, before and at the time of the bankruptcy, had a sufficient possession on which to found their lien for a general balance. In *Kinloch v. Craig*, the decision was on a stoppage in transitu, and did not affect the question as to the supposed necessity of actual possession. These defendants were responsible to *Duncan & Co.*, and to the orders of the defendants alone were the staves shipped. *Duncan & Co.* never looked to the orders of *M. Michael*, but to those of the defendants, with whom the contract was made, who promised payment of the residue of the price, and who were to have the power of keeping the staves for one month, rent free, on the premises of *Duncan & Co.*, where they were as much in the possession of the defendants as if they had been in their own warehouses.

DALLAS, C. J. It is not necessary, in my view of this case, to enter into any distinction between actual and constructive possession. It has, however, *651] been *contended that it is not necessary that the broker who claims a lien for his general balance should have an actual possession of the goods on which he claims such lien, a constructive possession being sufficient. Now it appears to me, that a mere review of the facts of this case will be decisive of the present question. The contract was entered into with *Duncan & Co.* by the defendants as brokers for *M. Michael*, and the invoice was made out to him. The staves, after the purchase, were to remain on the premises of *Duncan & Co.* for one month, rent free, and after the expiration of that time, *M. Michael* was to pay rent at an agreed rate until their removal. Can it be contended, that, after the expiration of the month, *Duncan & Co.* could have sued the defendants for rent with any probability of success? If the staves had been destroyed by fire, would the loss have fallen on the defendants or on *M. Michael*? On the latter undoubtedly: the possession was uniformly in him. It never has been contended that the defendants had an authorised manual possession of these goods; they formed a mere channel for orders, exercising no dominion whatever over the goods, except at the direction of *M. Michael*, until the last unauthorised removal of the staves. Were the first shipments to *Bristol* made in consequence of orders emanating from the defendants? Quite the contrary: they were made in consequence of direct orders from *M. Michael*, who, at the same time, expressly directed the defendants not to remove the residue without his further orders. The possession was clearly in *M. Michael* when he gave his orders to the defendants to make the shipment for *Bristol*; and I am of opinion, that nothing was subsequently done which made any alteration in that possession.

*652] *PARK, J. I am of the same opinion. I never remember to have met with a case more destitute of facts to authorise the supposition, that the possession was in the factor. The contract was made by the defendants for *M. Michael*, who throughout was held up to *Duncan & Co.* as the vendee. Nor do they attempt the removal of the goods from the yard of the vendors, or take upon themselves in any way to dispose of them, excepting under the direction of *M. Michael*, until the last unauthorised effort which was made after the docket had been struck. I was of counsel in the case of *Man v. Shiffner*, which, in my opinion, has no bearing on this case. For what were the facts of *Man v. Shiffner*? There *Atherton & Astley* were middlemen, the defendants were their agents, and the opinion of the court was not founded on any right which the defendants had to retain the policy from the plaintiff, on the ground of their having a lien on it to satisfy their claim on *Atherton & Astley*, but on the ground that the defendants were servants of *Atherton & Astley*, who were entitled to hold the policy as against the plaintiff, who claimed from *Heath* the consignor, until their claim on *Heath* was satisfied, on the score of their general balance. There is no ground whatever for the claim of these defendants. *Duncan & Co.* are even obliged to urge the removal of the goods, but the

defendants, having no orders from *M. Michael*, leave them on the premises of *Duncan & Co.* It is but fair to suppose, that, if the right of possession had been in the defendants, they would have removed the goods, without waiting for such pressing messages from *Duncan & Co.*; for an early removal of the goods in question to their own premises would have been of importance to them, had they, at an early period of the transaction, contemplated the claim which they now set up.

*BURROUGH, J. It is incumbent on factors who claim a lien, to prove their possession of the property on which the lien is claimed. Possession is matter of fact; and the jury, in this case, have found that the possession was not in the defendants, but in *M. Michael*. In order to disturb that verdict, it must be shown to the court, that the jury have done wrong; now I am of opinion that they have formed a perfectly right conclusion. Is there any evidence from the beginning to the end of this case, to show that the possession ever passed from *M. Michael*, to the defendants; or that they themselves have done any act to show that they had a possession in the goods in question? I am of opinion that there is not the slightest ground for the claim of the defendants, and that the plaintiff is entitled to recover.

Rule discharged.

DOWSE v. EVERARD.

[2 Moore. 737. S. C.]

The defendant, being licensed to let post-horses, agreed with the proprietors of a country weekly newspaper, to convey the same on *Friday* in every week from *N. S.* to *L.*, where he delivered the same for a weekly payment. The paper was conveyed by the defendant or his boy, generally on horseback, and sometimes in a one horse chaise; and the defendant was in the habit at such times of carrying parcels for hire from *N. S.* to *L.* Sometimes he carried a passenger; but in that case he paid the post-horse duty. In an action of *assumpsit* by the farmer of the post-horse duties, for duties alleged to have been incurred by him in executing this contract, the court held that there was no letting to hire for the purpose of travelling to bring the defendant within the liability created by statutes 25 G. 3. c. 51, or 44 G. 3. c. 98. sch. B.

Assumpsit by the plaintiff, who was a farmer of the post-horse duty for the counties of *Lincoln*, *Leicester*, and *Nottingham*, against the defendant, who was landlord of the *Globe Inn* at *Sleaford*, and licensed to let horses to travel post, for duties alleged to have been incurred by him in executing a contract which he had made with the proprietor of the *Stamford Mercury*, for the conveyance of that paper weekly from *Sleaford* to *Lincoln*. [*654]

The declaration stated that the defendant was indebted to the plaintiff as farmer of the post-horse duties in and for the county of *Lincoln*, for certain duties due from the defendant to the plaintiff, as farmer as aforesaid, in respect of divers horses, mares, and geldings, by the defendant, let to hire by the mile, to be used in travelling in *Great Britain*, and for divers horses, &c., by him let to hire by the stage, to be used in travelling, and used in travelling in *Great Britain*; and also for divers horses, &c., let to hire for a less period than twenty-eight days, for drawing, and used in drawing, on public roads in *Great Britain*, carriages used for travelling post or otherwise; and also for divers horses, &c. let to hire by the defendant for a day, or less period of time, for drawing, and used for drawing on public roads in *Great Britain*. There were two other more general counts, stating that the defendant was indebted to the plaintiff as aforesaid, for horses let to hire to be used in travelling post, &c.,

and the money counts. Plea, *non assumpsit*. At the trial before *Richards*, C. B. at the last *Lincoln* assizes, the following admissions were read in evidence :

Messrs. *Newcomb*, of *Stamford*, were the proprietors and publishers of the *Stamford Mercury* weekly newspaper ; and the defendant, (who was licensed to let post-horses,) agreed with Messrs. *Newcomb*, to convey, and did convey such paper, on *Friday* in each week, from *New Sleaford to Lincoln*, for them ; and delivered the same at *Lincoln* for twelve shillings *per week*. The paper was carried on *Friday*, weekly, by the defendant or his boy, from *New Sleaford to Lincoln*, generally on horseback, and occasionally in a single horse *855] chaise. The defendant *did not return such horse or chaise in his weekly account of post-horses to the stamp-office, (he the defendant conceiving the same not within the operation of the acts relating to post-horses,) except in those cases, where, in his weekly journeys, he carried a passenger, on which occasion he paid the duty. The defendant also, in his said journeys from *New Sleaford to Lincoln*, carried parcels for hire for persons when they applied to him for that purpose. It was contended for the defendant, that these facts did not bring him within the liability to the post-horse duties, and *Richards*, C. B., having expressed himself to be of that opinion, the jury found a verdict for the defendant.

Vaughan, Serjt., on a former day had obtained a rule *nisi* to set aside this verdict, and have a new trial on the ground of the mis-direction.

Lens, Serjt., now showed cause, and contended that this use of the horse or carriage in carrying the papers, could not be considered as a travelling in *Great Britain* under the 44 G. 3. c. 98. *sched. B.*† [BURROUGH, J. To bring a *656] horse or carriage within the statute, there *must be a letting to hire for travelling.] This defendant cannot be said to let his horse to hire: he carries the paper himself, and shall it be said, that he lets the horse to hire to himself? Nor can this be considered such a travelling as will bring the defendant within the statute 25 G. 3. c. 51, and render him liable to the duty for letting his horse to hire. To bring a case within the acts, there must not only be a travelling, but a contract with reference to a horse or carriage; but here there is only a contract to carry papers. In the event, the defendant does, indeed, use a gig, because the papers are heavy. A common carrier, who travels to convey goods, would not come under the statute. In *Smith v. Moss*,‡ the letting to hire of a hearse and four horses for the conveyance of a corpse from *York to Brecon* for burial, for a specific sum, and not after a rate *per mile*, was holden not to render the proprietor liable to the post-horse duty. There can be no pretence for saying that the defendant was travelling with a horse let to hire.

Vaughan, in support of the rule. The plaintiff is entitled to recover. The admissions, when viewed with reference to the stat. 25 G. 3, c. 51,§ and the

† The 44 G. 3. c. 98, enacts that the duties inserted in the schedule shall be raised; and the following duties are inserted in schedule B.:

Horse, mare, or gelding, hired by the mile or stage, to be used in travelling in *Great Britain*, for every mile such horse, mare, or gelding shall be hired to travel, 14

Horse, mare, or gelding, hired for a less period of time than twenty-eight successive days, for drawing on any public road any coach or other carriage used in travelling post or otherwise, by whatsoever name such carriage now is or may hereafter be called or known, (if the distance at the time of hiring such horse, mare, or gelding, shall be ascertained,) for every such mile, such horse, mare, or gelding shall be hired to travel, 14

Horse, mare, or gelding, so hired as last above-mentioned, in any case where the distance shall not, at the time of such hiring, be ascertained, for each day for which such horse, mare, or gelding shall be so hired, 14

‡ 3 M. & S. 15. Note. The twenty-third section of statute 57 G. 3. c. 59, the duties are not to attach on horses drawing fish, or hackney chariots; but are to attach on those drawing hearses in the same manner as those hired for drawing mourning coaches or other carriages.

§ By which it is enacted, in section four, " That every postmaster, innkeeper, or other person in *Great Britain* who shall let to hire any horse for the purpose of travelling post

stat. *44 G. 3, c. 98, s. 12, will be found to come within the range of liability to the post-horse duty. In the first mentioned act, a duty of three half-pence is imposed for every horse, &c., hired by the mile or stage, to be used in travelling post in *Great Britain*. In the last named act, the word "post" is, as it were, studiously omitted, to make the operation of the act as general as possible. It would be a subject for consideration, whether this defendant would not come under the first act, for what shall be considered as a travelling post is *vexata questio*. Lord *Kenyon*, in the *King v. Webber*, 3 T. R. 72, held that the carrying of a letter by express, was a travelling post, and the court there decided, that one who lets a horse to hire to carry a private express, must take out a license under the fourth section of the stat. 25 G. 3, c. 51. There is not a very wide difference between that case, *and the case before the court; for here the papers are to be sent within a given time. In *Hanley v. Cubberley*, 15 East, 257, a person applied to the defendant, who kept a public house at *Pertshore*, but was not licensed to let out horses for hire, to let him have a horse the next day, to go to *Worcester* and back again. The party rode the horse to *Worcester* and back, and paid 5s. to the defendant, who was held to be within the stat. 44 G. 3, c. 98, schedule A. By the word "travelling," (the narrowed expression in the stat. 44 G. 3, the word "post," having been purposely dropped in schedule B., as was observed by Lord *Ellenborough* in the last cited case,) as used in the act, is to be understood any labor performed by horses, &c., for the purpose of progress upon the road, and the words "hired for drawing on any public road, any coach, &c., used in travelling post, or otherwise," which words are to be found in each of the acts, embrace every species of labor which a horse can perform on a road. The only two exceptions which are given by the stat. 57 G. 3, are in favor of horses drawing fish-carts, or carriages licensed by the commissioners of hackney coaches; and it is to be intended, that, in every other case, every horse travelling in *Great Britain* for hire, is liable to the post-horse duty.

DALLAS, C. J. This action is brought by the farmer of the post-horse duties, on the ground that the defendant has let to hire a horse for the purpose of travelling. I do not now enquire as to the definition of the word "travelling;" it is not necessary to make that enquiry; for the question at present before us for determination is; Has there been a letting to hire for the purpose of travelling? Let us see how the declaration *is framed. It alleges a letting to hire by the defendant; now, whether for travelling or not for travelling, it is absolutely necessary that there should have been a letting to hire, in order to bring the case within the declaration. The defendant appears to me to be in the situation of a common carrier; I see my brother *Vaughan* dissents; but he is represented to be in the habit of going from one place to another, carrying parcels for hire, for those persons who choose to employ him for that purpose: it is so stated in the Lord Chief Baron's report. Here, there is no letting of a horse

by the mile, or from stage to stage; or being a person usually letting horses to hire, shall let to hire for a day or any less period of time, any horse for drawing any coach or other carriage used in travelling post or otherwise, by whatsoever name such carriages now are, or hereafter may be called or known, for or in respect whereof any rates or duties, now or heretofore under the management of the commissioners of excise, are or have been made payable by any statute or statutes now in force, shall yield and pay annually unto his majesty, his heirs and successors, the sum of 5s. for a license for that purpose." And, "That for and in respect of every horse hired by the mile or stage, to be used in travelling post in *Great Britain*, there shall be charged a duty of 1½d. for every mile such horse shall be hired to travel post: and that for and in respect of every horse hired for a day or any less period of time for drawing on any public road any coach or other carriage used in travelling post or otherwise, by whatsoever name such carriages now or hereafter may be called or known, for or in respect whereof any rates or duties, now or hereafter under the management of the commissioners of excise, are or have been made payable by any statute or statutes now in force, there shall be charged, if the distance shall be then ascertained, the sum of 1½d. per mile; and if the distance shall not then be ascertained, there shall be charged the sum of 1s. 9d. for and in respect of each horse so hired; such duty to be paid by the person or persons by whom such horse shall be so hired."

and carriage to his employers; it is no part of the defendant's contract that he should take the papers by the carriage; sometimes he takes them on horse back, sometimes in his gig, but there is nothing in his contract which binds him to do either; he might have carried them on foot. I am, therefore, of opinion, that the Lord Chief Baron was right, and that this rule must be discharged.

PARK, J. I am of the same opinion. There is no doubt, that in *Hanley v. Cubberley*, the retaining the word "post," in schedule A. of the 44 G. 3, was considered to have been a mere slip, and I agree with Lord *Ellenborough*, in thinking that the word was purposely omitted in schedule B. But, in *Hanley v. Cubberley*, the decision was, that the letting a horse to hire, to go a stage and back again within the day, was a letting to hire, and the person who let the horse was required to take out a license under schedule A. of the statute. In this case we may drop all inquiry as to the definition of the word "traveling;" for, to support this action, there must have been a letting to hire; now can any one be said to let to hire to himself? One part of the argument for the plaintiff would go the length of establishing, that, if a man licensed to let *660] post-horses should take one of them and use it himself, in case of the illness of any of his family, to procure immediate medical assistance, such a person would be liable to the post-horse duty.

BURROUGH, J. Of the same opinion.

Rule discharged.

In the Matter of SAMBROOK BURGESS.

[2 Moore 745. S. C.]

A bill of exchange, drawn by A. for 98*l.* 11*s.*, was dishonored, and duly protested. A. afterwards became bankrupt, and the interest on the bill amounted to 1*l.* 17*s.* at the time of the issuing of the commission: Held, that this interest could not be added to the principal so as to form a good and sufficient petitioning creditor's debt on which to found the commission of bankrupt against A.

A CASE, of which the following is the substance, was sent for the opinion of this court by order of the Lord Chancellor.

On the 26th of *August*, 1816, a commission of bankrupt issued against *Sambrook Burgess*, on the petition of *Daniel Cropper*, and the act of bankruptcy on which the commission was founded was committed on the 23d of *August*, 1816. The debt, in respect of which *Daniel Cropper* procured the commission to be issued, was sworn by him to be due in respect of the following bill of exchange.

"98*l.* 11*s.* 0*d.*

Manchester, Jan. 2, 1816.

"Three months after date, pay to the order of myself, ninety-eight pounds, eleven shillings, value received as advised.

"SAMBROOK BURGESS.

"To Messrs. Butterworth & Evans,
"Watling Street, London,"

The bill was accepted by Messrs. *Butterworth & Evans* as follows:
*661] "Accepted, payable at Messrs. *Glyn, Mills, & Co. Butterworth & Evans*;" and was thus indorsed, "Pay to Messrs. *Thomas Peet, & Co.*, or order, *Sambrook Burgess*. Per pro. *Thomas Peet, & Co., D. W. Osbaldist'n, Daniel Cropper*."

The bill having been thus indorsed by *S. Burgess to Peet, & Co.*, and by them, in manner before mentioned, to *Daniel Cropper*; *Daniel Cropper*, before the bill became due, for a valuable consideration, indorsed the same to *John Cropper*, who indorsed it for a valuable consideration to *Joshua Metcalf*.

The bill not having been paid, *Metcalf* caused it to be noted and protested for non-payment; and, after it had been protested, it was returned by *Metcalf* to *Daniel Cropper*, and *Metcalf* demanded of *Daniel Cropper*, and he actually paid or allowed to *Metcalf* on the 8th of *April*, 1816, the sum of 98*l.* 11*s.* the amount of the bill, and 13*s.* 8*d.* for the protest and expenses, making together the sum of 99*l.* 4*s.* 8*d.*

The protest was made and written on the 5th of *April*, 1816, the day on which the bill of exchange became due; and due notice of the non-payment and also of the protest was given to *Sambrook Burgess*.

The amount of the debt claimed by *Daniel Cropper*, to be due to him from *Burgess*, at the time of the petitioning for and of the issuing of the commission of bankrupt consisted of the following particulars.

Amount of the bill	-	-	-	-	-	£98	11	0
Four months and sixteen days interest thereon	-	-	-	-	-	1	17	2
Protest and expenses	-	-	-	-	-	0	13	8
						<hr/>		
						£101	1	10

The question for the opinion of the court was, whether, under the circumstances stated, *Daniel Cropper* had at the time of suing out the commission of *bankrupt against *Sambrook Burgess*, a good and sufficient debt as [*662 petitioning creditor to support the commission.

The case was argued on a former day in this term.

Hullock, Serjt., in support of the commission. The amount of the bill with interest thereon forms a good petitioning creditor's debt. Interest is due on all liquidated sums from the instant the principal becomes due and payable, and, therefore, on all bills of exchange and notes of hand payable at a day certain.† And such interest is not in the nature of damages, for it is never put to the jury as a question on which they have a discretion, whether they shall give interest or not on a bill of exchange. It is not necessary that the interest should be secured by the instrument itself in order to make it provable as a debt under a commission: it is sufficient if there is a written contract for a sum of money payable on demand, or on a day certain,‡ and if it can be collected that there was a contract between the parties, that interest should be payable.§ Interest has been allowed to creditors, where, by the course of trading and settled accounts it was allowed after a certain credit, *ex parte Champion*, 3 Bro. Ch. Ca. 436. Though it was held in *Seaman v. Dee*, 1 Ventr. 198, that debt lies not for the interest of money, but that it is to be recovered in *assumpsit*, Lord *Kenyon*, in *Herries v. Jamieson*, 5 T. R. 556, says, that if it were rightly decided in that case that an action of debt will not lie for interest, great injustice would be done in a variety of instances: and in *Doran v. O'Reilly*, 5 Dow. 133, in which *Seaman v. Dee*, was cited, a count for interest, in an [*663 action of debt, was held to be well laid. Here, the sum is 98*l.* 11*s.*, the protest was regularly made, and due notice given, and, in such case, the statutes 9 & 10 W. 3. c. 17. and 3 & 4 Ann. c. 9.,|| give interest and charges from the day of protest. Under them, therefore, the interest may well constitute a part of the petitioning creditor's debt; and, if it cannot be proved under

† By the court, in giving judgment in *Blaney v. Hendricks*, 2 W. Bl. 761. S. C. 3 Wils. 205.

‡ By Sir W. Grant, Master of the Rolls, in *Lowndes v. Collins*, 17 Ves. 28.

§ See *Tew v. The Earl of Winterton*, 3 Bro. Ch. Ca. 495.

|| Made perpetual by stat. 7 Ann. c. 25.

the commission, the petitioning creditor would be without remedy; for the bankrupt's certificate would be a bar to an action at law. Commissioners, after a man becomes a bankrupt, compute interest upon debts no lower than the date of the commission, because it is a dead fund.† In order to support this commission, it is not sought or required to compute the interest lower than the date of the commission, which may, therefore, both according to the cases and statutes, be well sustained on this bill of exchange and the interest due thereon.

Lens, Serjt., contra. The whole practise of the commissioners of bankrupt, together with the authorities, supported by the rules uniformly laid down by Lord *Hardwicke*, and Lord *Thurlow*, are at variance with the position laid down in support of the commission. It is true, that if a jury perversely refused to give interest, the court would interfere and set aside their verdict; but, though the jury, in cases where interest is claimed, are well disposed to adopt the direction of the court, they are the parties who give the interest; and they give it as damages. It is not disputed, that a count for interest is good, where the interest *664] is on a *contract for the same; but it is not due otherwise.‡ It has been solemnly decided by the Court of King's Bench, that on a mere count for money had and received, interest cannot be recovered. *De Bernales v. Fuller*, 2 Campb. 426. In *Blaney v. Hendricks*, the interest was allowed upon an account stated between merchant and merchant, but the court there drew a distinction between the case before them and the case of goods sold and delivered; for, in the latter, the sum is not liquidated till the jury find the value. Lord *Thurlow*, in *ex parte Champion*, recognised the distinction, and agreed with Lord *Hardwicke's* rule, that where a contract is entered into for a certain sum, and interest could not be given at law but in the shape of damages, it is not the course of the court to give interest in bankruptcy, 3 Bro. Ch. Ca. 439.] [Park, J. *Lee v. Lingard*, 1 East, 401, is a very strong case. Lord *Kenyon*, there said, "Wherever interest is intended to be given, it forms part of the damages assessed by the jury, or by those who are substituted in their place by the parties."] *Doran v. O'Reilly*, does not touch the present question. 'There is no doubt that debt will lie for interest where interest is due as a debt; but it will not lie where the interest is not due as a debt, but only as damages. [Dallas, C. J. Is it pretended that interest has ever been allowed by the commissioners of bankrupt in a case like the present; in other words, are we not called upon to overturn the uniform practice? Park, J. I was for nine years a commissioner of bankrupts, and my brother *Burrough*, held that office for a much longer time: I never knew an instance of interest being allowed in such a case as the present, and it appears to me, that, to allow it, would be to contradict all the rules *665] laid down by Lord *Thurlow*, and Lord *Hardwicke*, and all experience. 'To allow it would involve this absurdity, that it would be allowed first as due to the petitioning creditor, and afterwards the commissioners would have to cut down his debt to a less sum than would have supported his petition. *Burrough*, J. Very frequently has it been pressed before me, sitting as a commissioner of bankrupts, to grant interest in such cases, and, as often, have we uniformly refused it.] 'The stat. 9 & 10 W. 3., does not alter the law otherwise than to permit persons observing the act, to recover interest where they are by law entitled to recover it, leaving the question open in what cases interest is due, and in what cases it is not; and the statute of *Ann* only extends the same right of recovery to cases of non-acceptance, making a protest unnecessary, where the bill is under 20l. [Park, J. The practice of referring bills of exchange and promissory notes to the master or prothonotary, is of a comparatively late date.§ In the case of *Maunsell v. Massareene*, 5 T. R. 87, I successfully opposed a reference to the master, to

† *Ex parte Bennet*, 2 Atk. 528.; and see *Cooke's Bankrupt Laws*, s. 9. tit. Interest, p. 195., 7th edit.

‡ *Callon v. Bragg*, 15 East, 223.

§ See *Heldipp v. Otway*, 2 Wms. Saunders, 107. note 2.

see what was due on principal and interest, on the ground, that the bill was for foreign money, the value of which could only be ascertained by a jury.] The more modern decisions completely confirm the rules laid down by Lord *Thurlow*, and Lord *Hardwicke*. Interest out of the surplus of a bankrupt banker's estate, was refused upon his promissory notes payable on demand, as not being debts carrying interest either by contract or on the face of them.† And, in *ex parte William*, 1 Rose, 399, the Lord Chancellor dismissed the petition with costs, saying, "I will not *alter the practise of bankruptcy, being of opinion that interest is payable in the nature of damages at law, and not as provided for by the contract." [*666]

Hullock, was heard in reply, and distinguished *Lee v. Lingard*, from the present case, inasmuch, as there the sum was payable on an award, and no interest arose thereon: and he observed, that in *Serjeant Williams's* note to *Holdipp v. Otway*, the right of the court to submit interest to the officer for taxation was much discussed, and the conclusion come to by the modern decisions, that it might be done, was a test that it was a debt and not damages, for the court could not increase damages. The statute of *William* and *Ann*, he also urged, were express in giving legal interest after protest, and that they, therefore, governed this case.

The following certificate was afterwards sent.

This case has been argued before us. We have considered it, and are of opinion that, under the circumstances above stated, the said *Daniel Cropper*, had not at the time of suing out the said commission against the said *Sambrook Burgess*, a good and sufficient debt as petitioning creditor, to support the said commission.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

† *Es parte Cox*, 1 *Rose Bankruptcy Cases*, 317,; and see note (a) to that case, p. 318.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
HILARY TERM,
IN THE
FIFTY-NINTH YEAR OF THE REIGN OF GEORGE III, 1819.


MEMORANDA.

IN the last vacation, *William Draper Best*, Esq., one of his Majesty's Serjeants, learned in the law, and Chief Justice of *Chester*, was appointed one of the Judges of the Court of King's Bench.

John Richardson of the *Middle Temple*, Esq., barrister at law, was appointed one of the Judges of this Court, having previously been called to the degree of Serjeant at law. He gave rings with the motto, "*More majorum*," and took his seat on the first day of this term.

John Singleton Copley, Esq., Serjeant at law, was appointed to the office of Chief Justice of *Chester*.

*670] *On the first day of this term, the following gentlemen took their seats within the bar.

As his Majesty's Serjeants, learned in the law,

Albert Pell, Esq.

John Singleton Copley, Esq.

As his Majesty's Counsel, learned in the law,

Giffin Wilson, of *Lincoln's Inn*, Esq.

Michael Nolan, of *Lincoln's Inn*, Esq.

Stephen Gaselee of *Gray's Inn*, Esq.

And *Robert Matthew Casberd*, of the *Middle Temple*, Esq., he having received a patent of precedence.

PROTHEROE v. THOMAS.

[3 Moore 3 S. C.]

The court will not compel the attendance of a witness before the prothonotary to enable him to tax a bill of costs arising in this court, referred to him for that purpose by a Master in Chancery.

PELL, Serjt., moved for a rule to show cause why *Peter Rainsford Rigby* should attend the prothonotary of this court, for the purpose of giving evidence to enable the prothonotary to tax a bill of costs which had been referred to him for that purpose by one of the Masters of the Court of Chancery.

The bill of costs, in a cause in Chancery between *Rigby* (the father) v. *Edwards*, had been referred to the Master for taxation, together with all other proceedings between the parties. Upon going into the taxation, the Master found that there had been a cause of *Protheroe v. Thomas* in this court, and for the purpose of taxing the costs in that cause, he required the aid of the prothonotary of this court; it being usual when a bill is referred to an officer, for him (in case the proceedings in another court form part of the bill) to apply to the officer of that court for assistance. In taxing the bill, the prothonotary required the evidence of *Peter Rainsford Rigby*. To show that the court had jurisdiction to compel the attendance of a party before the officer for purposes of taxation, *Elwood v. Sir Godfrey Kneller*, Ser, 477, was cited. [671]

DALLAS, C. J. We have no authority over this cause; it is not in this court, but is before the Court of Chancery only. The reference is made to the officer of this court by the Master in Chancery, to whom the officer of this court must be considered merely as an assessor.

Rule refused.

DEFFLE v. DESANGES, et al.

[3 Moore 4. S. C.]

Two partners in trade left their shop, stating their purpose to be to get some bills discounted, or to get some means to satisfy demands; and told their shopman, if any creditor called, to make some excuse. On the next day the shopman, without further authority, denied them, although at home, to a creditor, who had called on the preceding day, when they were also denied. No evidence of any attempt to get bills discounted was offered: Held, that the jury had rightly considered their intention in leaving the shop to be to delay creditors.

THIS was an action against the sheriffs of *London*, for a false return of *nulla bona* to a writ of *fiery facias*. The cause was tried before *Dallas*, C. J., at the *London* sittings after the last term; and the question was, whether the party against whose goods the writ of execution issued, had committed a prior act of bankruptcy, so as to defeat it. It appeared in evidence, that two persons, named *Reed* and *Baker*, had for some time carried on the business of linen drapers in partnership. On the 13th of *March* last, they were in the shop where the business was conducted, and *Reed* said to *Baker*, "that they must be off to get some bills discounted, or to get some means somewhere to satisfy demands; and he told the shopman, if any person should call, to make some excuse, or say that they were not in the way. They then both went away. *Reed* lived at the shop, and *Baker* at some distance at his own [672]

house, but it was usual for him to be at the shop in the morning, but not afterwards. *Reed* returned to the shop about two hours after his departure with *Baker* on the 13th, and the latter returned on the next morning. The only person who called during their absence, was a person of the name of *Mainwaring*, to whom *Baker* was indebted for ironmongery, delivered to *Baker* for his private house. *Mainwaring* had also supplied a stove for the shop on their joint account. He asked the shopman for *Reed* or *Baker*; and on being told that they were both out, he said, "Tell them I called, and wish one of them would pay me." On the 14th they were informed of their having been denied, and approved of it; *Baker* then said, "I cannot help it, I have no money left to pay any one." On that day *Mainwaring* called again, while they were both at home; but the shopman denied them for this reason, that there had been a dispute between *Reed* and *Baker*, on account of the latter having incurred many debts on his own account, and he was afraid that this application from *Mainwaring* would renew the quarrel. The shopman stated on the trial, that he did so right or wrong of his own head. They had not desired him to deny them on that day. *Dallas*, C. J., left it to the jury to decide with what intention they left the shop on the 13th; and the jury considering that they left the shop for the purpose of avoiding creditors, found a verdict for the plaintiff. Leave was given to move to set it aside, if the court should be of opinion that an act of bankruptcy had not been committed.

*673] *Copley*, Serjt., now moved accordingly.

DALLAS, C. J. I left it to the jury to consider what was the purpose of *Reed* and *Baker* in leaving the house on the 13th, whether to get bills discounted or to delay creditors. No evidence was offered to show that they had made any attempt to raise money while they were out on that day. Had they gone out for that purpose, that would have been to accelerate the payment of their debts; but the order left with the shopman, was to make excuses in case any creditor should call. No countermand of such order was made; and, on the 14th, they were informed of their having been denied, and approved of it; *Baker* then said, "I cannot help it, I have no money left to pay any one." The jury under these circumstances, might well presume *Mainwaring* to have called for payment of the joint debt, and that *Reed* and *Baker* left the shop with the intention of delaying creditors.

PARK, J. The question for what purpose the parties quitted the shop was very properly left for the consideration of the jury; and they, in my opinion, came to a right conclusion. The message left with the shopman showed the intention to delay creditors.

BURROUGH, J., and *RICHARDSON*, J. concurred.

Rule refused

*674]

*NEIL v. LOVELACE.

[3 Moore 8. S. C.]

Where a defendant surrenders in discharge of his bail in the vacation after the term in which final judgment has been signed, that term is reckoned as one of the two terms within which the plaintiff must charge him in execution.

VAUGHAN, Serjt., on a former day in this term, had obtained a rule *nisi* that the defendant might be discharged out of the custody of the warden of the *Fleet*. Final judgment against him had been signed in the last *Trinity* term; and he surrendered himself in discharge of his bail in the following vacation; and the

plaintiff was, immediately thereupon, served with notice of render. The plaintiff did not charge the defendant in execution until after the last term. *Vaughan* contended, that *Trinity* term was to be considered as one of the two terms, in which, by the rule of this court, *Easter*, 8 G. 1.,† the defendant should have been charged in execution. He cited *Smith v. Jefferys*, 6 T. R. 776.

Pell, Serjt., now showed cause, and urged that as this case had been before *Burrough*, J., on summons in **December* last, and he had refused to interfere, the present application could not be attended to, it having been [*675 ruled by the court in the last term, in the case of *Blandford v. Champneys*, that they would not review any thing that had passed before a judge of the court at chambers. As to the time in which it is necessary to charge the defendant in execution, where the defendant renders himself in discharge of his bail, the plaintiff may charge him in execution at any time within two terms after judgment signed.

DALLAS, C. J. If a judge has made an order, and the party is dissatisfied with the order, he must move to set it aside; he cannot pass it over, and come to the court. But if a judge refuses an order, there the situation of the party remains as it was, and he may come to the court. Where a case has been fully stated on affidavits, it is but mercy to the party not to permit him to litigate the point further before the court, and it is entirely in their discretion whether they will entertain the motion or not. The decision of the court in the last term, which has been referred to, is not applicable to the present case. That case was originally before the court, and was heard on affidavits before a judge at chambers, who was, therefore, substituted for the court itself. I think the rule, 8 G. 1., must be construed according to the judgment of the Court of King's Bench in *Smith v. Jefferys*; and, consequently, that this rule should be made absolute.

PARK, J. In *Smith v. Jefferys* it is observed by *Lawrence*, J., that a distinction had prevailed in practice between a surrender after verdict, and a surrender after judgment and that, in the latter case, the term in which judgment is signed, is reckoned as one of the terms in which the defendant must be charged in execution, and *that that distinction prevailed in the practice [*676 of this court. I am, therefore, of opinion, that the defendant should be discharged.

BURROUGH, J. and RICHARDSON, J., concurred.

Rule absolute.

† If any defendant hath, or shall render him or herself, or be rendered to the *Fleet* prison, in discharge of his or her bail, at the suit of any plaintiff, where no further proceedings by declaration have been had against such defendant so rendered, before such render, unless the plaintiff shall declare against such defendant within two terms after such render; and where any declaration hath been delivered against such persons so rendering him or herself, or being rendered, or judgment has been had against him or her before such render, unless the plaintiff shall proceed to judgment upon such declaration delivered within three terms after such render, (the defendant having appeared,) and charge such defendant in execution within two terms after such judgment obtained, such defendant may be discharged out of custody by *supersedeas*, to be allowed by one of the justices of this court, if cause shall not be shown to the contrary. as aforesaid, by the plaintiff or his attorney, upon notice to either of them, given by the defendant's attorney or agent, and oath made of such notice given. Rules, orders, and notices in the Court of Common Pleas, 2d edit.

WOODERMAN et al. v. BALDOCK.

[3 Moore 11. S. C. by the name of *Woodham and Another v. Baldock.*]

A. assigned his effects to trustees for the benefit of his creditors. By the deed, the trustees were enabled to allow *A.* to remain in possession of any part of them until the remainder should be sold, and the debts collected. They sold a part of the goods by public sale, describing them as *A.*'s property, and suffered him to remain in possession of the remainder, on the security of which *B.* knowing them to be the property of the trustees, gave credit to *A.* Execution afterwards issued at the suit of *B.*, and the goods were sold under a *feri facias*: Held, that the trustees might recover against the sheriff in an action of trespass, *B.* having had notice of the change of property, and the possession of *A.* being consistent with the deed.

TRESPASS. The action was brought against the defendant, as sheriff of the county of *Kent*, to recover the value of certain goods sold by him, in *June*, 1818, under a *feri facias*, issued at the suit of *Samuel Matterson* against *Thomas Fowler*.

At the trial before *Dallas, C. J.*, at the *London* sittings after the last term, it appeared that *Fowler*, in 1817, had executed a deed of assignment of his goods to the plaintiffs for the benefit of his creditors, in which deed there was a provision empowering the trustees to permit *Fowler* to use such of the goods as the trustees should think fit, until the debts due to him should be collected, and his other effects sold. *Fowler*, at that time, was in possession of goods at *Plumstead*, of which the trustees, in 1817, sold a part by public auction, and permitted the remainder to remain in the possession of *Fowler*, (which he, with the consent of the trustees, removed from *Plumstead* to *Woolwich*,) and *Fowler* *677] there continued in possession of them until the execution in 1818. 'The goods which were sold at the auction were not stated to be the property of the trustees, but the advertisement of the sale and the catalogue described them as the goods of *Fowler*. *Matterson*, had subsequently advanced money to *Fowler* on the security of the goods of the latter, which had been removed to *Woolwich*, but was at the same time informed by *Fowler* of the goods being the property of the trustees. *Dallas, C. J.*, being of opinion, that there was sufficient notice of a change of property in the goods, left it for the jury to determine, whether the trust deed was fraudulent or not, upon which, considering the deed not to be fraudulent, they found a verdict for the plaintiffs.

Vaughan, Serjt., now moved for a rule *nisi*, that this verdict might be set aside and a new trial granted on the ground of the trust-deed being fraudulently, as there was not sufficient notice of the change of property in the goods, and as the trustees had never taken possession of any part of them. If the goods at *Plumstead* had been sold as the property of the trustees, that would have been notice to the world of the change of property in them: but they were advertised as the stock of *Fowler*, and no mention was made of his insolvency. The trustees never showed that they acted upon the deed of trust, until the execution issued, and then this secret assignment was set up. In *Kidd v. Rawlinson*, 2 Bos. & Pul. 59, the goods were bought at a public sale by a person not a creditor, and lent by him to the original owner for an honest purpose. In *Leonard v. Baker*, 1 M. & S. 251, and *Haselinton v. Gill*, 3 T. R. 620. n, the goods were sold as the property of the persons to whom they had been assigned; but, here, after the assignment, the goods were sold as the property *678] of *Fowler*. The evidence of fraud is, that no possession was taken under the deed, and that the goods were sold after the assignment, not in the name of the trustees, but of the insolvent.

DALLAS, C. J. By the terms of the deed of assignment, the trustees were enabled to permit the insolvent to remain in possession of the goods for a reasonable time, and *Matterson* knew, at the time of his taking the goods as a security for his debt, that they were not the property of *Fowler*, but of the trus-

tees. It is well known, that if a man, having been informed that there is a judgment and execution, should, for the purpose of defeating them, purchase the goods of the debtor, such purchase would be void, because the purpose is iniquitous : but I cannot see any reason for disturbing this verdict.

PARK, J. The question in this case is, whether the deed is fraudulent under the 13th *Eliz. c. 5.* The fact of the original owner being left in possession of the goods, is, of itself, generally a badge of fraud; but here, the possession of *Fowler* was consistent with the provisions of the trust-deed. This case does not depend on general notice; *Matterson*, at the time of taking the security, had special notice that the property belonged to the trustees. I cannot, therefore, see any ground for granting a new trial.

BURROUGH, J. I am clearly of opinion, that in this case, the possession was consistent with the deed of assignment.

RICHARDSON, J. Whether *Matterson* had notice of the deed at the time of taking the security is a question of fact, and not of law; and it was properly left to the *jury to determine whether the deed was fraudulent or not. They [*679 have found it not to be fraudulent, and I am of opinion, therefore, that the rule ought not to be granted.

Rule refused.†

† [See American decisions cited at the end of the case of *Reed v. Blades*, 5 Ante 225. Also *Joseph v. Ingram*, Post. 838. 1 Moore 189. S. C.]

BOEHM v. CAMPBELL.

[3 Moore. 15. S. C.]

The plaintiff having shipped goods to *R. S.*, refused to deliver the bill of lading to him without a guarantee, upon which the defendant enclosed a bill, accepted by *R. S.*, in a letter to the defendant, in which he stated that *R. S.*, having accepted the bill, he gave his guarantee for the due payment of it in case it should be dishonored: Held, that the consideration was sufficiently expressed upon the guarantee.

ASSUMPSIT on a guarantee. The first count of the declaration stated that the plaintiff was a person carrying on trade, by the stile and firm of *Boehm & Co.*, and that before and at the time of making the bill of exchange thereafter mentioned, certain persons carrying on trade by the stile and firm of Messrs. *Sawyer, Tobler & Co.*, were indebted to the plaintiff in the sum of 1026*l.* 7*s.* 6*d.*, for goods shipped, sold, and delivered by the plaintiff to Messrs. *Sawyer, Tobler, & Co.*, and for money advanced and paid by the plaintiff to the use and on account of Messrs. *Sawyer, Tobler, & Co.*, and at their request; and that thereupon, in consideration of the premises, and that the plaintiff would give to Messrs. *Sawyer, Tobler, & Co.*, time for payment of the sum of money so due and owing to the plaintiff until a certain period agreed upon, and would, as a security for such payment, take a certain bill of exchange, to be drawn by the plaintiff, in the name, stile, and firm of *Boehm, & Co.*, upon Messrs. *Sawyer, Tobler, & Co.*, to bear date the 1st of *August*, 1818, for payment three months after date, to the order of the plaintiff, of the sum of 1026*l.* 7*s.* 6*d.*, and to be accepted by *Sawyer, Tobler, & Co.*, and by such acceptance to be made payable at the house of certain *persons using the stile and firm of Messrs. [*680 *Sykes & Co.*; the defendant undertook and faithfully promised the plaintiff to guarantee the due payment of the bill should it be dishonored by the acceptors. The plaintiff averred, that, confiding in the promise and undertak-

ing of the defendant, he did give to Messrs. *Sawyer, Tobler, & Co.*, time for payment of the sum of money so due from them to him for the period aforesaid; and did, as a security for such payment, take the said bill of exchange, which was afterwards drawn, accepted, and made payable in manner aforesaid. The plaintiff averred, also, that he indorsed the bill to certain persons, using the stile and firm of *Sillem and Grantoff*, who presented the same when due to Messrs. *Sykes & Co.* for payment; but that Messrs. *Sykes & Co.*, did not, nor did Messrs. *Sawyer, Tobler & Co.*, or any other person, pay the said bill; and that thereupon Messrs. *Sillem and Grantoff* caused the same bill to be protested for non-payment, and returned to the plaintiff, who by reason thereof was obliged to pay, and did pay the amount of the bill, together with interest and expenses, to *Sillem and Grantoff*. There were four other special counts, varying the consideration and promise. The defendant pleaded the general issue.

At the trial of the cause before *Dallas, C. J.*, at the *London* sittings after the last term, it appeared, that the plaintiff had shipped corn to Messrs. *Sawyer, Tobler, & Co.*, to the amount of 999*l.* 17*s.* 6*d.*, and that he held their acceptances for that sum, but, suspecting their solvency, had applied to the defendant to give him a guarantee, without which he refused to part with the bill of lading of the corn. Upon this the defendant wrote the following letter:

"Messrs. *Boehm & Co. Antwerp*,
" *London, August, 14, 1818.*

*681] "Gentlemen,—Our mutual friends, Messrs. *Sawyer, *Tobler, & Co.*, having accepted the underwritten bill, drawn on them by your firm, I hereby give my guarantee for the due payment of the same, should it be dishonored by the acceptors."

The bill referred to was as follows:

"*Antwerp, 1st of August, 1818.*

"Three months after date pay to our order, one thousand and twenty-six pounds, seven shillings and sixpence, value in account, as advised by

"1026*l.* 7*s.* 6*d.*

Boehm & Co.

"To Messrs. *Sawyer, & Co. London.*

"Accepted at Messrs. *Sykes & Co.*

"*R. J. Sawyer, Tobler, & Co.*"

The sum for which the bill was drawn above the price of the corn, was made up by adding the insurance and other charges. The bill and the acceptance were written in *London*, the plaintiff's name being written on it in pencil, but it was afterwards signed by him at *Antwerp*. Messrs. *Sawyer, Tobler, & Co.* having stopped payment before the bill became due, it was dishonored, and the defendant refused to pay the amount of it. The defendant objected, first, that the bill being drawn in *London*, required a stamp; secondly, that no consideration was expressed on the guarantee; and, thirdly, that the declaration averred the bill to have been drawn, accepted, and made payable after the defendant's promise; whereas, the guarantee referred to a bill at that time in existence. *Dallas, C. J.*, overruled the first and third objections, but reserved the point upon the second, subject to which a verdict was found for the plaintiff.

Vaughan, Serjt., now moved for a rule *nisi*, that the verdict should be set aside, and a nonsuit entered; and contended, that the consideration was not *682] expressed upon the guarantee, and therefore, that the plaintiff, according to the decision in *Wain v. Warlters*, 5 East, 10, could not maintain the action. In *Morris v. Stacey*, 1 Holt's N. P. C. 153, the agreement was held to be within the statute of frauds; but that case, he urged, was not applicable to the present; and it was there expressly stated by *Gibbs, C. J.*, that it was not necessary to overrule the decision in *Wain v. Warlters*. Here there

was not any consideration expressed on the instrument, which therefore, came within the rule laid down in *Wain v. Warlters*.

DALLAS, C. J. This case does not require us to express any opinion upon the case of *Wain v. Warlters*. The authority of that case has been shaken by Lord Eldon, in *ex parte Minet*, 14 Ves. 189, and *ex parte Gardom*, 15 Ves. 286, but here the consideration is set out, which was not the case in *Wain v. Warlters*. We do not mean, therefore, to give any opinion on that case, for the consideration is sufficiently expressed on this guarantee. It is, that in consideration that the plaintiff would take a bill, drawn and accepted by *Sawyer, Tobler, & Co.*, the defendant undertook to guarantee the payment of it, in the event of its being dishonored; we are, therefore, of opinion, that the plaintiff is entitled to recover.

The rest of the court concurred.

Rule refused.†

† Note. See *Saunders v. Wakefield*, 4 B. & A. 595. *Jenkins v. Reynolds*, 3 Brod. & Bing. 14. *Russell v. Moseley*, *ib.* 211.

[See 17 Mass Rep. 123. *Packhard v. Richardson et al.* where the Sup. Court of Massachusetts held that the consideration of a promise need not, under the statute of frauds and perjuries, be expressed in the instrument. The doctrine is different in N. York. See 3 Johns. 210. *Scars v. Brink et al.* 8 ib. 29. *Leonard v. Vredenburg*.

Under the statute of Virginia, it is not necessary that the consideration should be in writing. 5 Cranch 142. *Violett v. Patton*. See note to Amer. ed. of 4 Barn & Ald. 605.]

*HOWMAN, Demandant; ORCHARD, Tenant; BARNEY, Vouchee. [*683

[3 Moore 20. S. C.]

The court will not amend a recovery by adding to the description where the description is already sufficient to pass the lands.

LENS, Serjt., moved to amend this recovery, by inserting "the parish of *Hapton*." The deed to make the tenant to the *præcipe* conveyed "all that the manor of *Fundenhall*, with the appurtenances, and also all that the rectory and parsonage impropriate of *Fundenhall*, with the rights, members, and appurtenances in the said county of *Norfolk*, and all glebe and other lands to the said rectory belonging or appertaining, containing by estimate, fifty-nine acres, together with all the tithes, obventions, oblations, emoluments, profits, and hereditaments, parcel of the same rectory, or to the same in any wise belonging." The recovery, which was in *Trinity* term, 46 G. 3., was of "the manor of *Fundenhall*, with the appurtenances, and also the rectory of *Fundenhall*, with the appurtenances, and also all and all manner of tithes, oblations, and obventions, whatsoever, yearly arising, growing or renewing in *Fundenhall*, in the parish of *Fundenhall*." A part of the lands above mentioned so containing together fifty-nine acres, and belonging to the said rectory, manor, or parsonage impropriate, were situate in the parish of *Hapton*, which was not noticed in the recovery.

DALLAS, C. J. The court will not allow an amendment to be made unless there is a necessity for it; the description as it now stands, is sufficient to pass the whole of the property, and consequently no amendment can be necessary.

*BURROUGH, J. There can be no doubt that the whole of the property can be recovered in an action of ejectment by this description. The [*684 term rectory is not confined to one parish.

PARK. and RICHARDSON, Js., concurred.

Amendment refused.

ROSCOW v. CORSON.

The captain of a vessel, in the due course of his voyage, put into port for the purpose of repairing damage, and while the repairs were proceeding, was absent, and continued absent for a much longer time than was necessary to finish the repairs; and, during his absence, procured forged papers. He afterwards returned to the vessel, and instead of proceeding on the voyage, carried the vessel to a foreign port. On the trial of the cause the jury found that the act of barratry was committed during the absence of the captain, while the vessel was repairing: Held, that the verdict was right.

THIS was an action upon a policy of assurance, whereby the cargo on board the ship *Newry*, was insured at and from *St. Petersburg* to *Liverpool*. The cause was tried before *Dallas*, C. J., at the *London* sittings, after last *Easter* term, upon admissions in writing, which were as follows:

A policy of assurance, bearing date the 6th day of *June*, 1814, on the ship *Newry*, *Forrest*, master, bound from *St. Petersburg* to *Liverpool*, was effected. The name of the defendant, by procuration, was thereunder subscribed for the sum of 250*l*. The vessel sailed from *St. Petersburg*, tight, staunch, strong, and well found in tackle, having on board the full complement of hands. On the 12th of *September*, in the prosecution of her voyage, a heavy gale of wind came on, which caused considerable damage to her, and on the 25th of *September*, she struck on a reef of rocks near the island of *Lessoë*, and from that *685] time until about the 10th of *October*, she *encountered very severe weather, which so damaged her as to make it necessary for her to put into the first convenient port. On the 15th of *October*, she arrived at *Yarmouth*. On the 31st of *October*, leave was obtained for her to unload her cargo, for the purpose of repairing her damage. She began to discharge her cargo on the 4th of *November*, and finished on the 11th of the same month. She began her repairs on the 30th of *November*, and finished on the 25th of *December*. While the repairs was proceeding the captain went to *Ireland*, to see his family, and left them on the 11th of *February* following, to return to *Yarmouth*. Having finished her repairs and reshipped her cargo on the 10th of *March*, on the 12th of *March*, the captain wrote the following letter to Mr. *John Crowther*, of *Liverpool*:

"Sir,

"I enclose you all the brig *Newry's* accounts in *Yarmouth*; also her survey, protest, &c. &c. Mr. *Caulfield* gave me no orders to go to any person in *Liverpool*; therefore I will put her into your hands on my arrival there. I expect to sail to-morrow, and hope shortly to have the pleasure of seeing you in *Liverpool*."

Mr. *Caulfield* was the owner of the vessel, and the accounts and charges enclosed amounted to 936*l*. 4*s*. The *Newry* sailed from *Yarmouth* on the 13th of *March*, 1815, for her destination. Shortly after her departure from *Yarmouth* she sprung leak, and put into *Dartmouth* about the 1st of *April*, where she remained about fourteen days, the captain having, while there, drawn a bill on his owner for 30*l*. to cover the expenses at that place, and again proceeded on her said voyage; but, instead of sailing to the port of destination, he sailed to the *Azores*, where the ship arrived under the name of the *Nancy*, Captain *Forrester*. The captain died at *Terciera*. On the examination of the *686] captain's papers after his decease, it *appeared that he had concealed the original papers of the vessel, and had forged others; and, instead of calling the vessel the *Newry*, had called her the *Nancy*; and instead of his own name *Essex Forrest*, had called himself *Edward Forrester*. Instead of the original consignors he had made *William Danby Palmer*, of *Yarmouth*, the consignor; and instead of *John Leigh*, and *Lund*, and *Unsworth*, of *Liverpool*, he had made *Thompson & Everring*, of *New York*, consignees. Instead

of the destination of the vessel being from *St. Petersburg* to *Liverpool*, he made it from *Yarmouth* to *New York*. *William Danby Palmer*, of *Yarmouth*, was the agent for the vessel on her arrival and during her stay at that port. The average loss sustained on the cargo of the vessel was 55*l.* 9*s.* 9*d.* per cent. by barratry of the master, on which account only the plaintiff sought to recover; and if a verdict were given for the plaintiff, it was to be taken for the sum of 138*l.* 14*s.* 4½*d.*

Dallas, C. J., left it to the jury to consider at what period the barratry had commenced; and they having found that the barratry was in prosecution at *Yarmouth*, found a verdict for the plaintiff.

Vaughan, Serjt., now moved for a new trial, on the ground, that there was not any evidence of the act of barratry before the date of the letter, but merely of the intent. It is quite clear, that if no barratry took place before the letter, the underwriters should be discharged; for then the delay at *Yarmouth* was a deviation. The journey to *Ireland* was merely the conception of a barratrous act, which was done afterwards. To constitute barratry there must be some act: here there is only presumptive evidence and conjecture of the intention to commit the act; but there is no evidence of the act having been committed at the time of this *letter being written. Supposing papers to have been [*687 forged in *St. Petersburg*, and to have been found so at the death of the captain; yet if no act of barratry had been committed, the mere conception of the barratrous act could not have made the underwriters liable. The captain staid in *Ireland* longer than he ought to have done, and his delay amounts to a deviation.

DALLAS, C. J. This case was tried upon facts admitted by both parties. The jury found that the barratry not only had its beginning in conception at *Yarmouth*, but was also in prosecution. The cargo might have been discharged and taken on board again within a much shorter space of time. The vessel might have been ready about the 4th or 5th of *January*, but she remained until the middle of *March*. The captain staid in *Ireland* until the 15th of *February* the original papers were destroyed; the name of the vessel altered; her destination changed in the prosecution of her voyage; and there is no account of the loss of time from the 25th of *December* to the middle of *March*, during which time the captain was in *Ireland*. It has been said there is merely presumption and conjecture; but that must always be the case in matters of fraud, which are hatched in secrecy. I told the jury, that they had to consider not only whether the intention was conceived at *Yarmouth*, but that they should also consider the circumstance of the delay in *Ireland*, where alone the captain could have provided himself with the forged papers. The jury agreed that they could not account for this delay in any other manner than that of its arising from an act of barratry. In my opinion, there is no ground for disturbing the verdict.

PARK, J. The jury have found fraud, and the fact of the captain's delay longer than was required, and that *such delay was for the purpose of [*688 barratry. This motion must be refused.

BURROUGH, J. The jury have properly drawn a presumption from facts, which is within the discharge of their duty. Criminal delay is to all intents a barratrous act; and the jury have found a right verdict.

RICHARDSON, J. The detention at *Yarmouth*, if done in the prosecution of a barratrous act, is part of the barratry, for which the underwriters are liable, and is not a deviation by which they are excused.

Rule refused.†

† [See *Phillips* on Insurance, Chap. xiii. sect. 2.]

PROUTING v. HAMMOND.

The plaintiff assigned his ship to the defendant as a security for the repayment of money; but on the register it appeared to be an absolute assignment. The defendant sold the ship, and told the plaintiff that he had received the purchase-money, and would account with him for the balance of the proceeds of the sale. In an action upon the money counts, the court held, that the plaintiff was entitled to recover this balance, the acknowledgment being sufficient to support the action.

THIS was an action of *assumpsit* on the common money counts, and on an account stated. On the trial of the cause before *Dallas, C. J.*, at the *London* sittings after last *Easter* term, the following facts appeared in evidence. The plaintiff was owner of the ship *Dolphin*, and in *April*, 1818, he transferred all his interest in the ship to the defendant, as a security for money advanced by him to the plaintiff. Every thing required by the registry acts was correctly done; but by the register it appeared to be an absolute conveyance. On the *689] transfer, it was agreed that the defendant should sell the vessel and repay himself out of the proceeds, and pay the residue to the plaintiff. A bond was given at the same time for the re-conveyance by the defendant of the vessel to the plaintiff, on payment of the money advanced, and to account for the proceeds if sold.

The defendant afterwards sold the ship to a person named *Grant*, and received from him the purchase-money. The plaintiff afterwards met the defendant, and asked him if he had sold the ship. The defendant answered, that he had sold it for 1400*l.*, and would make out the account and pay the plaintiff the balance. Under these circumstances, it was objected at the trial that the plaintiff could not recover in this action, on the ground that registration was conclusive evidence of property in a ship; and *Dallas, C. J.*, reserved the point. A verdict was found for the plaintiff.

Copley, Serjt., now moved for a rule to show cause why a nonsuit should not be entered. It has been decided that what appears upon the registry is conclusive evidence of property. *Ex parte Yallop*, 15 Ves. 60. [*Park, J.*, adverted to *Robertson v. French*, 4 East, 130.] If, in the latter case, the counsel had produced a certificate of registry, it would have rebutted the *prima facie* evidence which possession afforded. *Camden v. Anderson*, 5 T. R. 709, is also applicable to this case. It appears on the certificate of registry, that the defendant is absolute owner; and no averment can be received to contradict the register. The consequence is, that there can be no consideration for the promise to support this action; there is no consideration for the undertaking to pay over the proceeds of the sale. A promise to render an account of property *690] of which the party is absolute owner, is bad for want of consideration. In *Battersby v. Smyth*, 3 Maddocks, 110, an agreement that three persons should buy a ship, and that it should be registered in the name of two of them only was considered invalid. Besides, the party is not without remedy; he may sue on the bond.

DALLAS, C. J. The present question is not, what would be evidence of the title to the ship if the title were disputed; if it were, the plaintiff's possession would be *prima facie* evidence of absolute ownership. It is unnecessary now to discuss whether it would be rebutted by proof of the certificate of registry. In this case the defendant himself, not pretending any title to the ship, says to the plaintiff, that he had sold his ship and has received the money, and will make out his account and pay the balance. I have always understood that an admission of having received the money of another, is evidence to enable the party to recover on the count for money had and received, and that the submission to account is evidence to support the count on an account stated.

PARK, J., and *BURROUGH, J.*, concurred.

RICHARDSON, J. This decision has nothing to do with evidence of title or the registration, but is founded upon the acknowledgment made by the defendant. It will not affect any of the cases decided under the register acts.

Rule refused.

ADDEY et al. v. WOOLLEY et al.

[*691

[3 Moore 21. S. C.]

Under the 54 G. 3. c. 170. s. 8, an action on a bond, given to the overseers to indemnify the parish against the expense of an illegitimate child, must be brought in the names of the overseers in office at the time of commencing the action, though they may not be the overseers to whom the bond was given.

DEBT upon a bond given to the plaintiffs as overseers of the parish of *Mazey*, to indemnify the parish against the expenses which might be incurred by the birth of an illegitimate child. The defendants pleaded that the plaintiffs were not overseers of the parish at the time of the commencement of the action. General demurrer and joinder.

Copley, Serjt., for the plaintiffs. The only question in this case is, whether the action should be brought in the name of the overseers to whom the bond was given, or of the overseers in office at the time of the action being brought; and this depends entirely on the construction of the statute 54 G. 3. c. 170. s. 8.† This action is brought by the parties to whom the bond was given, *and not by the overseers at the time the action was commenced. There [*692 are nothing in the statute to prevent the plaintiffs from suing, and they are entitled to recover. The statute does not declare that the obligees shall not sue.

Blosset, Serjt., for the defendants, was stopped by the court.

DALLAS, C. J. There can be but one construction of the statute. The action should have been brought in the names of those who were overseers at the time of its commencement.

PARK, J., and BURROUGH, J., concurred.

RICHARDSON, J. The statute expressly states, that all securities of this nature shall be vested in the overseers for the time being. I am, therefore, of opinion that they are the only persons entitled to bring the action.

Judgment for the defendants.

† Whereby it is enacted, "That all securities given or received, or hereafter to be given, for indemnifying any district, parish, township, or hamlet, for the maintenance of any bastard child or children respectively, or any expenses in any way occasioned by such district, parish, township, or hamlet, by reason of the birth or support of any bastard child or children born within such district, parish, township, or hamlet, or chargeable thereto, shall be, and the same are thereby declared to be vested in the overseers of the poor of such district, parish, township, or hamlet for the time being; and that it shall and may be lawful for the overseers of the poor of such district, parish, township, or hamlet, to sue for the same, as and by their description of overseers of such district, parish, township, or hamlet; and such action so commenced by such overseers shall in no ways abate by reason of any change of overseers of such district, parish, township, or hamlet, pending the same, but shall be proceeded in by such overseers for the time being as if no such change had taken place: any law, usage, statute, or custom to the contrary in anywise notwithstanding."

CLENNELL, Plaintiff; STORER, Deforciant.

[3 Moore 22. S. C.]

Fine amended by substituting the name of a parish written on an erasure in the deed to lead the uses, for the name of another parish, on an affidavit stating that it was by mistake, and that the substituted name had been written on the erasure in the deed previous to its execution.

HULLOCK, Serjt., moved to amend this fine, by substituting the parish of *Allington* for the parish of *Rothbury*. It was sworn, that the parties intended to pass lands in *Allington*, and that name had been written on an erasure in the deed to lead the uses. An application had been made to the court for the same purpose *in the last term; but the court then refused the amendment, as there was not any affidavit that the parish of *Allington* had been written on the erasure before the execution of the deed; but, upon an affidavit to that effect being now produced, the court allowed the amendment.

Fiat.

FRANCE v. STEPHENS.

[3 Moore. 23. S. C.]

The court refused to issue a *distringas* to compel an appearance on an affidavit stating the declarations of the defendant's wife, the affidavit being insufficient without them, on the ground that the defendant should not be prejudiced by the declarations of his wife.

VAUGHAN, Serjt., moved for leave to issue a *distringas* to compel the appearance of the defendant on an affidavit of a sheriff's officer, which stated that he went to the house of the defendant, and there saw a person whom he knew to be the wife of the defendant, and was told by her that the defendant was absent from home for fear of his creditors; that he had endeavored by every means in his power to find him, but without success; that notice had been left at his house; and that it was the belief of the officer and of the neighbors of the defendant, that he had absconded for the purpose of avoiding an arrest.

The court being of opinion that the affidavit was insufficient without the evidence of the wife's declaration, and considering that such evidence should not be admitted to the prejudice of the husband, refused the rule.

Rule refused.

*In the matter of HICK et al.

By the terms of a reference to arbitration, the two arbitrators were to appoint an umpire before entering into consideration of the matters in difference, and to make their award before a certain day, or such time as they or any two of them should appoint. The arbitrators, before appointing an umpire, enlarged the time, and afterwards held a meeting, at which the parties attended: Held, that the parties, being aware of these facts, and having afterwards attended, could not now make any objection on the ground of the enlargement of the time, having been made before the appointment of the umpire.

Notice was given to one of the parties to attend at a meeting, for the purpose of taking instructions for the award, and at that meeting that party did not attend; but the other party attended, and was examined privately. On the evidence which he then gave, the amount he was to pay was decreased by the arbitrators: Held, that this private examination of the party in his own favor was incorrect, and that the award must, therefore, be set aside.

An agreement of reference, dated the 18th of *May*, 1816, had been entered into between *Hick*, *Ovey*, and *Tilstone*, who had been partners in trade, and were then dissolving the partnership, by which the matters in dispute were referred to *Hunt* and *Mavor*, and any third person whom they might appoint. In the agreement of reference it was provided, that previously to the arbitrators entering on the consideration of the matters referred, they should appoint an umpire; and the award was to be made in writing under the hands of *Hunt* and *Mavor*, and the umpire, or any two of them, before the 24th of *June*, or such other day as they or any two of them should enlarge the time to. On the 1st of *June*, *Hunt* and *Mavor* enlarged the time to *January*, 1817, and the umpire, *Ludlam*, was not appointed until the 21st of *July*, 1816. Subsequently to the enlargement and appointment of the umpire, the parties attended before the arbitrators. It was sworn by *Hunt* and *Mavor*, that they had privately examined *Tilstone* at a meeting as to his ability to pay a certain sum in which he was indebted to *Hicks*; that they believed that the solicitor of *Ovey* was informed of that meeting; that they also called on *Cotterel*, who was the solicitor of *Hick*, to *attend the meeting to take instructions for the award; [*695 that at the time of the meeting, as *Ovey's* solicitor did not attend, they refused to admit *Cotterel*; that, on this private examination, they found that *Tilstone* possessed but a very small property, and in consequence thereof they made a deduction from the amount in which *Tilstone* was indebted to *Hick*.

Bosanquet, Serjt., on a former day had obtained a rule nisi to set aside the award, on the following grounds, among others, viz. 1st, that the arbitrators could not, under the agreement, enlarge the time until after the appointment of an umpire; and, 2dly, that the arbitrators could not thus privately examine *Tilstone* without giving notice to the other parties of their intention to hold a meeting for the purpose of receiving evidence.

Copley, Serjt., now showed cause. As to the first objection, the only thing requisite by the reference was, that the umpire should be appointed previously to taking into consideration the matters in difference, which did not prevent their enlargement of the time. Besides, the parties must have known the time of the umpire's appointment, which was not until the 21st of *July*, and they must also have known that the original time expired on the 1st of *June*. They must, therefore, have been aware of the grounds of this objection when they afterwards attended before the arbitrators; and by such attendance they waived this objection. As to the second objection, that the arbitrators privately examined *Tilstone*, as he was a party, not a witness, and as the arbitrators had given notice of their intention to hold a meeting, they had a right, under the circumstances, to examine him separately.

DALLAS, C. J. As to the first objection, it appears that the parties were aware of it at the time they were *before the arbitrators; and, having [*696 gone before them with this knowledge, they must be taken to have waived this objection, and the court will not now interfere. As to the second

objection, it cannot be considered that when the solicitor of one party has notice of a meeting to take instructions for an award, and the other party does not attend, the arbitrators may examine a witness at that meeting. A party examined must be considered at least as a witness; it cannot be contended that it is just to allow a party who is suffered to become a witness in his own cause, to furnish evidence at the expense of the other parties to the reference, in their absence. The rule must be made absolute.

PARK, J. It would be quite contrary to justice, under the circumstances of this case, to hold that *Tilstone* was well examined in the absence of the other parties interested.

BURROUGH, J. The examination of the party in this case has been conducted in a manner contrary to the rules for the regulation of evidence adopted either by courts of law or equity, and I feel myself bound to protest against such a proceeding.

RICHARDSON, J., concurred

Rule absolute.

*697]

*DOE dem. WILLIAMS v. RICHARDSON.

An action of ejectment was referred to arbitration, and the reference, which was confined to that action, stated, that if the arbitrator should award that the plaintiff had any cause of action, he should have costs, as in a court of law. The arbitrator, by his award, directed the defendant to deliver up the premises, and pay the costs of the action, and a sum of money to the plaintiff for the loss of rent during the time the defendant held possession. He also directed the parties to execute general mutual releases. On a motion for an attachment against the defendant for the sum awarded to the plaintiff, held, that the award was in that respect good, although the arbitrator did not find in terms that the plaintiff had any cause of action; and also, that if the award were bad as to the direction of mutual releases, that would not vitiate the whole award.

THE rule of reference to arbitration in this case recited an action of ejectment and notice of trial in the county of *York*. The reference was confined to that action, and stated that if the arbitrator should award that the plaintiff had any cause of action, he should have costs as in a court of law; but if he should award otherwise, then the defendant was to have his costs. The arbitrator, by his award, directed that the defendant should give up the premises to the plaintiff; that he should pay the costs of the action, and pay 4*l*. 1*s*. for the loss of rent during the time he held over; but did not award that the plaintiff had any cause of action. The arbitrator also directed, that, on performance of the award, each of the parties should, at the charges of each other, execute releases from the beginning of the world to the day of the date of the award.

Blosset, Serjt., now showed cause against a rule nisi for an attachment for the sum of 4*l*. 1*s*. and costs, which had been obtained by *Hullock*, Serjt., in the last term. First, the arbitrator by his award has assumed to give to the plaintiff his costs; but he has not found that the plaintiff had any cause of action. Possibly the plaintiff's right to recover might have been good, yet a wrong demise might have been laid in the declaration, viz. before the right of action accrued; and then, though the recovery of the premises might be right, the event of the action ought to have been the other way. The arbitrator ought to have found that the plaintiff had a good cause of action. Secondly, after having directed that the plaintiff was to have his costs, the arbitrator awards that each party should deliver to the other, mutual releases of all matters affecting the premises, from the beginning of the world to the day of the date of the award, which makes the whole award bad. When any thing ordered

to be done is made part of the consideration, and to depend upon that which is not within the authority of the arbitrator, the award fails. 1 *Roll. Abr.* 259. l. 45. An award may be good in part, and bad in part, *Com. Dig.* Arbitrament, E. 19.; but if the bad part override the whole, the whole is bad. The award of the mutual releases is bad, and is part of the consideration; and, therefore, the award fails altogether.

DALLAS, C. J. It cannot be requisite that an arbitrator should set forth in terms that which is a necessary and inevitable consequence; viz. that the plaintiff had a cause of action. We are not to assume a possible case out of the award, but to intend every thing in favor of it. I think the award is good, except as to that part which relates to the release. The award is not vitiated by the surplusage, and the defendant is bound to perform it by paying this money.

PARK and BURROUGH, Js., concurred.

RICHARDSON, J. It may be understood, if necessary, that the releases directed, mean releases of all matters *relating to the matters in the submission [*699 to reference; but if that part be bad, it cannot vitiate the whole award.

Rule absolute for attachment for non-payment of the sum awarded and costs; the attachment to lie until *Monday*, in the office.†

[† See Kyd on awards, Chap. VI. March on Arbitrament 189. Savile 120. *Willmer v. Oldfield*. 1 Leon. 304 and Owen 153. S. C. 1 Brownlow 53. 65, *Rayson v. Winder*.]

PARKER et al., v. BISCOE.

[3 Moore 24. S. C.]

A will is revoked by a subsequent fine; and where a testator, by his will, devised his estates to his eldest son and his issue in tail, and afterwards by a codicil, (reciting that, since making his will, certain other estates had been devised by the brother of the testator to him for life, with remainder to his (the testator's) children and their issue,) revoked the devise of the estates mentioned in his will to his eldest son, and declared that a proviso contained in his will should be extended so as to comprehend the estates limited by the will of his brother, and to prevent the estates settled by the will of the testator from going with the estates limited by the will of his brother: It was held, that the codicil did not operate as a republication of his will, nor as a devise by implication or confirmation of the devise of the lands comprised in the will of the brother.

2. A fine of all the lands within a certain parish is sufficient to include a manor within that parish, although not mentioned by name.

ASSUMPSIT to recover the residue of the purchase money of certain estates in the parishes of *Tackley*, *Cuddesdon*, and *Denton*, in the county of *Oxford*, which had been purchased by the defendant from the plaintiffs, at a sale by public auction. The defendant had paid a deposit, and undertaken to pay the residue of the purchase money, on or before a given day, on having a good title to the premises. The defendant pleaded the general issue; and, upon the trial before *Gibbs, C. J.*, at *Westminster*, at the sittings after *Easter* term, 1817, the sufficiency of the title tendered by the plaintiffs being the only point in dispute between the parties, a verdict *was taken for the plaintiffs, subject to the opinion of the court, as to the sufficiency of the title, upon the [*700 following case.

Sir *John Whalley Smythe Gardiner*, Bart., by indentures of lease and release, dated respectively the 2d and 3d of *July*, 1787, executed upon his marriage with Miss *Martha Newcome*, settled certain hereditaments at *Tackley*, and *Cuddesdon*, and *Denton*, in the county of *Oxford*, and all other the heredita-

ments of him the said Sir John W. S. Gardiner, situate at *Tackley, Cuddesdon*, and *Denton*, to the use of himself and his heirs until marriage; then to the use of himself for life; and, after his decease, to the intent, that in case his intended wife should survive him, she should have for life an annuity of 800*l.*, in lieu of dower, with the usual powers of entry, distress, and perception of profits; and, subject thereto, to trustees, their executors, administrators, and assigns, for ninety-nine years, to commence from the decease of the said Sir John W. S. Gardiner, in trust for better securing the said annuity of 800*l.*; and, subject to the said term, to the use of the said Sir John W. S. Gardiner, his heirs and assigns. Sir John W. S. Gardiner, at the time of making the said settlement, was seised in fee of the said estates.

There is a hamlet in the parish of *Cuddesdon*, called *Wheatley*, and a manor by reputation called the *Manor of Wheatley*, which extends over the whole hamlet; but there are no copyhold tenants within *Wheatley*, nor any freehold tenants holding of the said manor. Sir John W. S. Gardiner, at the time of the said settlement, was seised in fee of lands within the said hamlet, and also of the said reputed manor; and by his will, dated the 13th of *April*, 1795, duly executed to pass real estates, after directing his debts to be paid, and bequeathing certain pecuniary legacies, he devised the estate at *Tackley*, to his wife, *701] Lady Martha *Gardiner, and her assigns, for her life; and he also gave her and her assigns for her life, one annuity or clear yearly rent charge of 200*l.*, (in addition to the 800*l.* which she would, in case she survived him, become intitled to by virtue of her marriage settlement,) and charged the said additional annuity upon all his lands and hereditaments, within *Tackley, Cuddesdon*, and *Denton*, which were by the said settlement made subject to the rent charge of 800*l.*, with the usual power of entry and distress upon the lands charged therewith, in case of non-payment thereof; and the testator also gave and devised all his lands and hereditaments at *Tackley*, then in his own occupation, (after the decease of his wife, and in the mean time subject to her life-estate therein,) and also all other his lands and hereditaments in *Tackley, Cuddesdon*, and *Denton*, (subject to the rent charges of 800*l.*, and 200*l.*,) and all other his real estate whatsoever, to Sir William Henry Ashhurst, his heirs and assigns for ever; to the use of his (the testator's) first and other sons successively in tail male; with remainder to the use of his daughters, as tenants in common in tail general; with remainder to the use of his (the testator's) brother, James Whalley, and his assigns for his life; with remainder to the use of James Whalley, the only son of the testator's brother, the said James Whalley, by his late wife, Elizabeth, deceased, and his assigns, for his life; with remainder to the use of the first and other sons of James Whalley, the son successively in tail male, with divers remainders over.

By indenture of covenant, dated the 12th of *May*, 1796, between Sir John W. S. Gardiner, and Lady Gardiner, of the one part, and G. Gostling, and Henry Newcome, of the other part, reciting the settlement made upon Sir John's marriage; and that Sir John and Lady Gardiner, were desirous of exonerating *702] the premises at *Tackley*, *from the payment of the rent charge of 800*l.*, secured for the jointure of Lady Gardiner, in case she should survive Sir John; and that the same should from thenceforth be exclusively charged on the premises at *Cuddesdon* and *Denton*, which being free from all incumbrances and of the annual value of 1150*l.* and upwards, would afford an ample security for payment thereof; Sir John, covenanted, and Lady Gardiner, consented and agreed with George Gostling, and Henry Newcome, to levy to them a fine *sur conuzance de trois, come ceo, &c.* of all the said lands and hereditaments in the several parishes of *Tackley, Cuddesdon*, and *Denton*, and of all other the premises subjected to the payment of the rent charge of 800*l.* And it was thereby declared and agreed that the fine should enure to the uses thereafter declared, *viz.* as to the premises at *Tackley*, to the use of Sir John, his heirs and assigns for ever, freed and discharged from the said annuity or yearly

rent charge of 800*l.* and all powers and remedies for recovering the same. And as to the premises at *Cuddesdon*, and *Denton*, and all other the premises agreed to be comprised in the said fine, whereof no use was therein declared, to the same uses, and charged in the same manner, and subject to the same powers of distress and entry, and the same term of years as by the said settlement were limited and declared of and concerning the whole of the premises.

Sir *John W. S. Gardiner*, previously to the date of his will, but after the date of his marriage settlement, purchased two small farms in *Tackley*, which were conveyed to him in fee, but which were not included in the last deed nor in the fine.

The reputed manor of *Wheatley* was not named in the last mentioned deed nor in the fine, which was duly levied, as of *Easter* term, 36 *G. 3.*, in which *George Gostling* and *Henry Newcome* were plaintiffs, and Sir *John W. S. Gardiner* and *Martha*, his wife, were deforciant, *of messuages and [703 lands in the parishes of *Tackley*, *Cuddesdon*, and *Denton*.

Sir *John W. S. Gardiner* died on the 18th of *November*, 1797, without issue, leaving *James Whalley*, his brother, and heir at law, and without having revoked or altered his will otherwise than by the operation of the said fine, and seised, together with other real property, of the said estates, devised or intended to be devised by his said will.

James Whalley, the brother of Sir *John*, by his will, dated the 2d of *July*, 1796, previous to the death of his brother, and duly executed to pass real estates, devised all his real estates, except certain copyhold estates therein mentioned, subject as therein mentioned, to trustees, their heirs and assigns, to the use of, or in trust for his eldest son *James Whalley* and his assigns, during the term of his life, without impeachment of waste, (except as therein mentioned.) with remainder to trustees, and their heirs during the life of his said son, in trust to preserve the contingent remainders, with remainder to the first, second, third, fourth, fifth, and all and every other the son and sons of the body of his said son *James Whalley* lawfully issuing, successively in tail male, with divers remainders over.

The last mentioned testator, soon after the death of his brother Sir *John W. S. Gardiner*, made the following codicil to his will :

"This is a codicil to be annexed unto and taken as part of the last will and testament of me, Sir *James Whalley Smythe Gardiner*, Bart., (lately *James Whalley*, Esq.) Whereas, by the death of my late brother Sir *John W. S. Gardiner*, Bart., without issue, I am become entitled for life to certain estates, hereditaments, and premises mentioned in the last will and testament of Sir *William Gardiner*, Bart., deceased, under and by virtue *of the same [704 will, with remainder to my first and other sons in tail male, with divers remainders over in favor of my issue, by which event the said estates, hereditaments and premises, will upon my death descend and go to my eldest son *James Whalley* ; I do, therefore, consistently with my said will, revoke and annul the limitation therein contained of my estates and hereditaments in favor of my said son *James Whalley*, it being still my will and intention that my said estates and hereditaments in my said will mentioned, shall not be held and enjoyed by any one of my sons and daughters, or his, her, or their issue, together with the said estates and hereditaments so as aforesaid limited by the will of the said Sir *William Gardiner*, deceased, as more fully and particularly expressed in the clause or proviso in that behalf in my said will contained. And, whereas, the said Sir *John Whalley Smythe Gardiner* hath in and by his last will and testament limited several estates and hereditaments therein mentioned, at *Tackley*, in the county of *Oxford*, and elsewhere, to or in favor of me for life, with remainder to or in favor of my children and their issue in such manner as therein specified; and it being also my will and mind that my said estates and hereditaments in my said will mentioned, and which are situate in the county of *Lancaster*, shall not be held or enjoyed by any one of my said sons or daughters,

or his, her, or their issue, together with the said estates and hereditaments, limited by the will of the said Sir *John W. S. Gardiner*, deceased, until or before the ultimate remainder or reversion limited in and by my said will, shall take place or come into actual possession; I do, therefore, will and declare, that the said clause or proviso contained in my said will, shall be extended and enlarged so as to comprehend the said estates and hereditaments limited by the will of the

*705] said Sir *John W. S. Gardiner*, as well as those limited by the will of the said Sir *William Gardiner*, and for preventing my said estates and hereditaments in and by my said will directed to be settled from going with the said estates and hereditaments, limited by the will of the said Sir *John W. S. Gardiner*, exactly in the same manner as is provided by the said clause or proviso with respect to the estates and hereditaments limited in and by the will of the said Sir *William Gardiner*. I do also will and declare, that such of my said children as may happen to be entitled, under my said will and this codicil, to my said estates and hereditaments in my said will directed to be settled, shall be considered as an oldest child, so far as to prevent, and for the purpose of preventing such child from being entitled under my said will, (in the same manner as is therein provided with respect to my oldest child,) to any part of the money to arise from the sale of my copyhold estates therein mentioned, or my personal estate; and also from being entitled to any share or part of the sum of 6000*l.* directed to be raised by the settlement made upon my marriage with my present wife: and I do hereby limit and appoint of and concerning the said 6000*l.* accordingly, and intending that in all other respects the same shall go and be divided, as mentioned in the said settlement."

The said Sir *James W. S. Gardiner* died on the 21st of *August*, 1805, without revoking or altering his said will and codicil, leaving *James Whalley Esq.*, (now Sir *James W. S. Gardiner*.) his eldest son and heir at law.

By indentures of lease and release, dated respectively the 30th and 31st of *July*, 1807, made upon the marriage of the said Sir *James W. S. Gardiner*, reciting that he was then seised of or well entitled to an absolute estate of inheritance in fee simple in possession, of and in divers lands and hereditaments, situate (among other places) at *Wheatley, Tackley, Cuddesdon*, and *Denton*:

*706] "And also reciting, that a treaty of marriage had for some time been carried on between him and *Frances Mosley*; it was witnessed, that in consideration of the said intended marriage, the said Sir *James W. S. Gardiner* did grant, release, and confirm unto the trustees, their heirs and assigns, (among other hereditaments,) all the hereditaments at *Wheatly, Tackley, Cuddesdon, Denton*, (being the estates comprised in the will of the said Sir *John W. S. Gardiner*, deceased,) to hold the same unto them, their heirs and assigns, to the use of the said Sir *James W. S. Gardiner*, until the said intended marriage should be solemnized, and, after the solemnization thereof, to the use of the said Sir *James W. S. Gardiner* and his assigns, for his life, *sans waste*; with remainder to the use of the said trustees, and their heirs during his life, in trust to support contingent remainders, and after his decease to the use of the first and every other son of the body of said Sir *James W. S. Gardiner*, on the body of said *Frances Mosley* to be begotten, successively in tail male, with divers remainders over.

And it was by the said indenture of release provided and declared, that it should be lawful for the trustees, and the survivor of them, and the executors or administrators of such survivor, at any time or times thereafter, at the joint request, and by the joint direction of Sir *James W. S. Gardiner* and *Frances Mosley*, during their joint lives, and after the decease of the said *Frances Mosley*, then at the request and by the direction of the said Sir *James W. S. Gardiner* alone, (testified by some writing under their respective hands and seal, or hand and seal, attested by two or more credible witnesses,) to dispose of and convey either by way of absolute sale or in exchange, or by some assurance or assurances in the nature of an exchange for or in lieu of other

freehold hereditaments, *all or any part or parts of the manors and other hereditaments thereby released, with the usual provisions for investing [707 the money to arise by the sale of the hereditaments in the purchase of other estates, and for conveying the purchased estates of those received in exchange, to the subsisting uses of the settlement, and for discharging purchasers from seeing to the application of their purchase moneys.

The estate sold, was comprised in the settlement of the 2d and 3d of July, 1787, and is situate in the parishes of *Tackley*, *Cuddesdon*, and *Denton*, and a small part thereof is in the said hamlet of *Wheatley* in the said parish of *Cuddesdon*, and was sold under the powers reserved to the plaintiffs by the settlement of the 31st of July, 1807, at the joint request and by the joint direction of the said Sir James W. S. Gardiner and Frances, his wife, made according to the form prescribed by the same settlement.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover.

Bosanquet, Serjt., for the plaintiffs. If there be any doubt upon the construction of the several instruments contained in the case, the plaintiffs are entitled to the benefit of it, as they claim as heirs at law. There are five points to be argued, 1st, whether the fine levied in 1796, and the deed declaring the uses of the fine effected a revocation of the will of Sir John W. S. Gardiner. And if so, then, 2dly, whether the codicil to the will of Sir James W. S. Gardiner amounted to, or had the effect of a republication of such will of Sir James W. S. Gardiner, so as to subject the estates in *Tackley*, *Denton*, and *Cuddesdon*, comprised in the fine of 1796, to the devises and limitations contained in such will. Or, 3dly, whether Sir James W. S. Gardiner's codicil *amounted to or contained a devise by implication of the estates at *Tackley*, *Denton*, and *Cuddesdon*, comprised in the fine. Or, 4thly, whether [708 the said codicil could in any manner be considered as amounting to a confirmation or restoration of the devise of the estates contained in the will of Sir John W. S. Gardiner. And, 5thly, whether as the reputed manor of *Wheatley* is not mentioned in the fine, the lands situate in the hamlet of *Wheatley* passed by the fine.

As to the first point, the question is no longer open to dispute. The rule has been laid down by Lord Kenyon, in *Goodtitle v. Otway*, 7 T. R. 419, in which case he says, "I take it that the law of the land is now clearly and indisputably fixed, if at any time it can be fixed, that where the whole estate is conveyed away to uses, though the ultimate reversion comes back again to the grantor by the same instrument, it operates as a revocation of a prior will." That case has been since confirmed by the case of *Doc v. Dillnot*, 2 N. R. 401, in which the court, referring to *Goodtitle v. Otway*, decided, that if a testator, after having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making any new will, the will made prior to the fine is revoked thereby. It is, therefore, clear that the fine operated as a revocation of the will of Sir John W. S. Gardiner. The second point, whether the codicil operates as a republication so as to bring down the will to the date of the codicil, appears as clear as the former point. In *Goodtitle v. Meredith*, 2 M. & S. 5, Lord Ellenborough states, that the effect of a codicil has been settled in a series of cases, the effect of which is to give an operation to the codicil *per se*, and, independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless indeed a *contrary intention be shown, in which case it will repel that effect. [709 Such, he continues, was the case of *Bowes v. Bowes*, 2 Bos. & Pull. 500, where the codicil devised the said lands; which word *said* was considered by the judges as controlling the effect and operation of the codicil, confining it to those lands which would have passed under the will as it originally stood, and not extending the will to all the lands at the date of the codicil. This is a stronger case than *Bowes v. Bowes*, in which the general rule was admitted.

There Lord *Eldon* says, that, although a republication of a will of lands certainly speaks as of the time of the republication, yet that, in all cases of that kind which had come before the courts for decision, the only question had been, whether the particular case was or was not within the general rule. He also observes, that wherever a question of this kind has arisen; those who had to solve the question had usually done so by satisfying themselves respecting the intent of the testator. The codicil recites the will of Sir *William Gardiner*, by which lands were limited to himself for life, with remainder to his children and their issue; and then the testator revokes the devise in his own will in favor of his son *James Whalley*. This part of the codicil adds nothing to the will, but merely revokes it as to the limitations to his eldest son. By the codicil he then recites, that the said Sir *John W. S. Gardiner* hath by his last will limited several lands at *Tackley*, in the county of *Oxford*, or elsewhere, in favor of the said Sir *James W. S. Gardiner* and his children, and their issue; and it being his will that his said estates in his will mentioned, and which are situate in the county of *Lancaster*, should not be held, &c. Now, this revocation can only extend to lands in his will, and lands in the county of *Lancaster*, *710] thereby expressly confining *the operation of the codicil to those lands; and negating it as to the lands in question. It cannot be contended, that this codicil, which merely operates as a revocation of his will as to a part of the lands thereby devised, can operate to devise other lands, that is the lands in *Oxford*. Besides, he recites, that the lands in *Oxford* have been disposed of in a different way; so, he not only confines the codicil to the intentions expressed in his will, but expressly recites that the other lands are disposed of altogether, supposing that he had no power over them. [*Richardson, J.* In this codicil there are no general words confirming the will.] Every thing tends to revoke, nothing to confirm. The words are, "consistently with my will." Now, what is contended for will not defeat the intention of the testator, for it will make these lands descend upon the son as heir at law, although excluded from taking under the will and codicil. The third point, whether the codicil can be considered a devise by implication, cannot require any argument; all implication is negatived. He considers these lands as already disposed of, and treats them as being out of his power. The codicil was made for the simple purpose of taking away from the eldest son a part of what could otherwise have come to him. To the fourth point the same arguments apply; for the codicil could not amount to a confirmation of the brother's will, as all implication of confirmation is negatived by the circumstance of the testator supposing that the lands were already disposed of, and that he had no power over them. For the same reason that the codicil did not amount to a devise by implication, it cannot be considered a confirmation. As to the fifth point; the reputed manor of *Wheatley* is within the parish of *Cuddesdon*, and the fine comprised lands in the parish of *Cuddesdon*, and must, therefore, have comprehended the lands *711] in the reputed manor of *Wheatley*, *of which indeed there are no copyhold or freehold tenants.

Blosset, Serjt., for the defendant, was stopped by the court, they being of opinion that upon every point which had been mentioned, the plaintiffs were entitle to recover.

Judgment for the plaintiffs.

DURELL v. MATHESON.

[3 Moore 33. S. C.]

Security for costs cannot be required from a foreigner in the habit of residing in this country four months in the year.

LENS, Serjt., on a former day in this term, had obtained a rule *nisi*, that the plaintiff should give security for costs, upon an affidavit stating him to be a native of *St. Petersburg*, and resident there.

Copley, Serjt., now showed cause, upon an affidavit, stating that this was an action for freight under a charter-party; that the plaintiff was then gone to some port on the continent, but was expected back soon, and upon his return, would probably reside here for some months; that although a native of *St. Petersburg*, he was in the habit of residing in this country for four months in the year, and had done so for the last thirty years; that he was possessed of a large property, and was well able to pay the costs. He cited *Nelson v. Ogle*, Ante, ii. 253, in which case security for costs was not required of a foreigner, a captain of a ship, who was in the habit of sailing to and from the ports of this country.

**Lens*, Serjt., in support of this rule. By the affidavit on the part of the defendant, it is averred; that the plaintiff is a native of *St. Petersburg*, and a resident there; the plaintiff has not contradicted the fact of residence except by circumlocution. To resist this application, he must directly negative the fact of his residence at *St. Petersburg*. [*712]

DALLAS, C. J. In *Nelson v. Ogle* the court held that the plaintiff's case was not distinguishable from that of an *English* sailor, and the affidavit stated that the plaintiff was never resident in any particular place. Here it is stated that the plaintiff is domiciled abroad, and that statement has not been directly answered; but, on the whole, we do not think this is a case in which security for costs can be required. His residence in this country for a given period in every year is distinctly stated.

Rule discharged.

LOPEZ v. DE TASTET.

A bond to secure the damages to be recovered upon a new trial, and the costs of the action, in the event of the result of a second action proving similar to that of the first action, is properly stamped with a 3*s.* stamp. The court will not amend a rule for a new trial by providing that the action shall not abate by the death of a party, where a surety has previously entered into a bond for payment of the damages and costs of the second trial.

In this case a verdict had been found for the plaintiff for the sum of 37,000*l.* A new trial was afterwards moved for, and the motion was acceded to, on condition that the defendant should procure a bond from Messrs. *Glyn, & Co.*, to secure to the plaintiff the sum to be recovered by the action and costs, in case a similar verdict should be given on the second trial. The *bond was [*713] procured from Messrs. *Glyn, & Co.*, stamped with a 3*s.* stamp.

Hullock, Serjt., on a former day, on an affidavit of these facts, had obtained a rule *nisi* to have the bond stamped with an *ad valorem* stamp at the costs of the defendant.

Lens, Serjt., now showed cause. There is nothing stated in the affidavit to

show that the stamp is an improper one. If it had a wrong stamp, the plaintiff should have made the objection when the bond was sent to him for his approbation, which he did not do. The expenses of procuring the execution which are heavy, have been paid by the defendant. The words of the statute are,† “bond in *England*, and personal bond in *Scotland*, given as a security for any definite and certain sum of money;” now this is not for a definite sum, for it is to secure the damages and costs of an action, the amount of which cannot be now ascertained. Neither can this bond fall into the other class: viz. “bond in *England*, and personal bond in *Scotland*, given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current.”† No money has here been lent, advanced, or paid, nor is there any account current, neither is this case within the spirit of the act, which contemplated money bonds only, and not indemnities. So far from being a definite sum, the defendant does not mean that the plaintiff shall have any sum whatever.

Hullock, in support of his rule. The sum of 37,000*l.* was due on the former verdict, and the stamp should, therefore, be on that amount at the least, for this *714] is sufficiently definite; the maxim *id certum est quod certum reddi potest*, applies here, or if not so considered, this bond should have a 25*l.* stamp under the words following the last mentioned clause, “where the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit.”

In a subsequent part of the act, page 1564, it is enacted, that “where any bond in *England* shall be given as a security for the performance of any covenant or agreement for the payment or transfer of any sum of money, &c., such bond shall be charged with the same duty as if the same had been immediately given for the payment or transfer of such money, &c.” This is an agreement within this clause, and the defendant is entitled to an efficient security.

DALLAS, C. J. When the court mentioned the security to be given in this case, they of course intended that it should be made upon a proper stamp, and I think that the present stamp is proper. This cannot be considered a bond for a sum certain, neither is it a bond for securing money to be lent, advanced, or paid, nor does it come within the clause as to bonds for the performance of covenants for payment of money. It is a mere indemnity bond, and is properly stamped. The rest of the court concurred.

Rule discharged.

On making this motion on a former day, *Hullock* also moved to amend the rule of court, which had been made relative to the new trial, on an affidavit which stated that the defendant had signified his intention of having a commission to examine witnesses abroad, and that a commission had left this country *715] to procure evidence in *Portugal*, which in all probability could not return to *England* for the purposes of the trial, until after next *Michaelmas* term, and that the defendant was eighty-seven years of age, and infirm. The amendment moved for was, that it might be provided by the rule, that the suit should not abate in the event of the death of the defendant.

The grounds of the application were to avoid expense, the costs of the former trial having amounted to upwards of 5000*l.* *Pleydell v. The Earl of Dorchester*, 7 T. R. 529, was mentioned.

DALLAS, C. J. That case turned on different circumstances, nor was there any guarantee. Here the party might have stipulated for the non-abatement of the suit at first, and then *Glyn & Co.* would have considered whether they would have entered into the bond or not on those terms; but the application is now made out of time, and cannot be granted.

The rest of the court concurring, as to the latter part of the motion, the Rule was refused.

LEWIS v. CAMPBELL.

[3 Moore 35. S. C.]

1. The assignee of an assignee of a lessee of a term for years may maintain an action upon a covenant for quiet enjoyment, entered into by the lessee with the first assignee and his assigns upon the assignment of the term to him.
2. If an assignee convert the lands assigned to him into pleasure grounds, and erect buildings on them, he cannot recover the value of the improvements in an action upon a covenant for quiet enjoyment, unless he states the special damage in his declaration specifically. *Quære*. Whether, if so stated, he could recover?

COVENANT for quiet enjoyment. The declaration stated, that on the 1st of November, 1803, by an indenture made between the defendant of the one *part, and Benjamin Corp of the other part; (after reciting that by inden- [716] ture dated the 1st of January, 1801, and made between James Barclay of the one part, and the defendant of the other part; Barclay, for the considerations therein mentioned, demised to the defendant, his executors, administrators, and assigns, certain premises, situate at Totteridge, in the county of Hertford, to hold the same to the defendant, his executors, administrators, and assigns, from the 25th of March, 1800, for twenty-one years, subject to a proviso for determining the said term, at the end of the first seven or fourteen years; yielding and paying yearly to Barclay, his heirs, or assigns, the yearly rent of 70*l*., by equal half-yearly payments; and further reciting, that Corp had contracted with the defendant for the purchase of several premises therein described, being part of the tenements above-mentioned, for the residue of the term, at the price of 420*l*.; and that the defendant in consideration thereof, had agreed to pay the said annual rent of 70*l*. to Barclay, his heirs, or assigns, and to pay and discharge all taxes during the continuance of the said term, and to indemnify Corp, his executors, administrators, and assigns therefrom;) it was witnessed, that for the considerations therein mentioned, the defendant bargained, sold, assigned, and set over to Corp, his executors, administrators, and assigns, certain tenements and premises therein described, part of the premises described in and demised by the said indenture of lease, and which were then held under and by virtue of the said indenture of lease, to have and to hold the same to Corp, his executors, administrators, and assigns, thenceforth for and during all the residue and remainder of the said term of twenty-one years therein then to come and unexpired. And the defendant for himself, his heirs, executors, and administrators, did thereby covenant with Corp, his executors, *administrators, and assigns, that it should be lawful for Corp, his exe- [717] cutors, administrators, and assigns, thenceforth from time to time, and at all times thereafter, during the continuance of the said term of twenty-one years, peaceably and quietly to enter into and upon, have, hold, use, occupy, possess, and enjoy the said tenements and premises thereby assigned, with the appurtenances, and to receive and take the rents and profits of the same premises, without any let, suit, &c. of, from, or by the defendant, his executors or administrators, or any person or persons whomsoever; and free and clear, and freely and clearly and absolutely acquitted, exonerated, released, and discharged, or otherwise by him the defendant, his heirs, executors, or administrators, at his or their own costs and charges, in all things well and sufficiently protected, saved harmless and kept indemnified of, from, and against all and all manner of former and other gifts, grants, and incumbrances, at any time theretofore, or to be thereafter made, done, committed, or suffered, by the defendant, his executors, or administrators, or any other person or persons: by virtue of which assignment Corp entered upon the premises, and became possessed thereof; and being so possessed on the 2d of January, 1804, by a certain indenture made between Corp of the one part, and the plaintiff of the other part, it was witnessed, that for the considerations therein mentioned, Corp assigned to the

plaintiff the lands so assigned as aforesaid; to hold the same to the plaintiff, his executors, administrators, and assigns, for and during all the residue of the said term of twenty-one years, then to come and unexpired: by virtue of which last-mentioned indenture, the plaintiff entered upon the assigned premises, and became possessed thereof. The plaintiff then averred his general performance, *718] and assigned for breach, that he *had not, nor could he from time to time, and at all times since the assignment to him of the said demised premises, and during the continuance of the residue of the said term of twenty-one years, peaceably and quietly have, hold, &c. the said lands and premises so assigned and granted by the defendant to *Corp*, and by *Corp* to the plaintiff as aforesaid; nor could he receive or take the rents and profits thereof, without the let, suit, &c. of, from, or by the defendant, or any person or persons whomsoever: for that *Barclay*, after the making of the said first-mentioned indenture, and during the said term of twenty-one years, to wit, on the first day of *January*, 1810, and continually from thence, until and at the time of the eviction and expulsion thereafter mentioned, had lawful right and title to the said premises so assigned by the defendant to *Corp*, and by *Corp* to the plaintiff as aforesaid, by reason of a forfeiture of the said premises before then committed by the defendant for a breach of a covenant contained in the indenture of the 1st of *January*, 1801; and having such lawful right and title to the same premises, after the assignment thereof to the plaintiff as aforesaid, and during the term of twenty-one years, in the said first-mentioned indenture specified, to wit, on the 11th of *August*, 1811, entered into and upon the same premises, with the appurtenances, and in and upon the said possession of the plaintiff thereof, and ejected, &c. the plaintiff from and out of the possession thereof, and kept and continued him so thereof ejected from thence; whereby the plaintiff had not only lost and been deprived of the use, benefit, and advantage of the said premises so assigned to him as aforesaid, but had also been forced and obliged to, and had necessarily paid divers sums of money, amounting together to a large sum of money, to wit, the sum of 300*l*. in endeavoring to defend his pos- *719] session of the *premises against *Barclay*, and had also lost divers other large sums of money, in the whole amounting to the sum of 2000*l*. by the plaintiff paid, laid out, and expended in and about the altering, improving, and ornamenting of the same premises, contrary to the form and effect of the first-mentioned indenture, and of the covenant of the defendant by him made with *Corp*, and his assigns, in that behalf as aforesaid.

The defendant pleaded, 1st, *non est factum* as to his indenture of the 1st of *November*, 1803; 2dly, a similar plea as to *Corp*'s indenture of the 2d of *January*, 1804; 3dly, that *Barclay* did not enter upon the premises so assigned as aforesaid, nor did he evict the plaintiff from the possession thereof; 4thly, that after the forfeiture, and before any eviction of the plaintiff by *Barclay*, *Barclay* ratified the plaintiff's title, and that by virtue thereof, he has ever since peaceably held, and still holds the said lands so assigned to him as aforesaid; and 5thly, that the plaintiff held and enjoyed the premises by the leave or license of *Barclay*. The plaintiff added a *similiter* to the three first, pleas and took issue upon the fourth and last.

At the trial before *Burrough*, J., at *Westminster*, at the sittings after last *Hilary* term, evidence was given of the execution of the deeds, of the eviction of the plaintiff by a judgment in an action of ejectment, and of the execution of the writ of possession. A surveyor also proved that several additions, consisting of coach-houses and outbuildings, had been made by the plaintiff, and that he had converted the lands into pleasure grounds; that the value of the property at the time of the assignment to *Corp* was 300*l*., and that the value of the additions and alterations was 450*l*. The jury having accordingly found a verdict for the plaintiff for the sum of 750*l*., it was objected on the part of the defend- *720] ant, that the *plaintiff could not recover more than the value of the pre- mises at the time of the defendant's assignment to *Corp*: whereupon

the question was reserved for the opinion of the court, whether damages could be recovered in respect of the improvements; and if they could, whether the declaration was so worded as to entitle the plaintiff to recover them.

Lens, Serjt., in the last term obtained a rule *nisi* that the judgment might be arrested, or the verdict reduced to 300*l.*; first, on the ground that the action was not maintainable, as there was not any privity of contract between the parties, or any privity of estate either at common law or by the statute 32 *Hen. 8. c. 34.*, as the defendant had parted with his whole interest; and, secondly, on the ground that at all events the damages must be reduced, the plaintiff not being entitled to recover more than the value of the premises at the time of the defendant's entering into the covenant, particularly as the declaration did not state the special damage with sufficient certainty.

Bosanquet, Serjt., now showed cause. There are two questions to be considered; first, as to the privity of estate; secondly, whether the verdict is to stand for the improvements. As to the first question, there can be no objection to the plaintiff's right to recover for want of privity of estate. This covenant is annexed to the land, and passes with it; and the plaintiff, as assignee of the land, can maintain an action upon the covenant. Where a man makes a conveyance in fee, with warranty annexed, he parts with all his interest; yet the warranty is annexed to the land. In *Sheppard's Touchstone*, P. 198., 7th edit., it is said, "All those that are parties to *the warranty, *i. e.* such as [*721 are named in the deed regularly, shall take advantage of the warranty; as if one doth warrant land to another, his heirs, and assigns; in this case both the heirs and the assigns may take advantage of it." This doctrine, which holds for a warranty, is stronger when applied to covenants. In *Purfrey's*† case, *Coke* cites *Randal* and *Barker's* case, 14 *Eliz.*, in which *Barker* covenanted, that if *Randal* should pay 400*l.* to him or his assigns before such a day, he would stand and be seised to his use in fee, and before the day he enfeoffed one *White* of the land, at which day the money was tendered to *White*; and it was adjudged that it was due to him, being the assignee of the land, and not to *Barker*, who was the covenantor. And in *Middlemore v. Goodale*,‡ the court agreed, that if *A.* seised of lands in fee convey them by deed indebted to *B.*, and covenant with *B.*, his heirs, and assigns, to make any other assurance upon request for the better settlement of the land, &c., and afterwards *B.* convey them to *C.*, who conveys them to *D.*, and afterwards *D.* require *A.* to make another assurance according to the covenant, and he refuse, *D.* shall have an action of covenant in this case against *A.* by the common law, as assignee of *B.* The whole estate of the defendant was parted with, and assigned over; and the assignee is entitled to the benefit of the covenant, although all the estate be out of the assignor, not by the statute 32 *H. 8.*, for that could not affect the case, but by the common law. In *Co. Litt.*, 384. b. Lord *Coke* says, "There is a diversity between a warranty that is a covenant real, which bindeth *the party to yield lands or tenements in recompense, and a covenant annexed to the land which is to yield but damages, [*722 for that a covenant is in many cases extended further than a warranty; as where two co-parceners made partition of land, and the one made a covenant with the other to acquit her and her heirs of a suit that issued out of the land, the covenantee aliened. In that case the assignee shall have an action of covenant; and yet he was a stranger to the covenant, because the acquittal did run with the land." The question is not new, but was settled in *Noke v. Audler*, Cro. Eliz. 373. 430. That was an action of covenant, which, as in this case, related to a term of years, and was brought by the assignee of an assignee against the assignor in respect of a covenant for quiet enjoyment entered into by the assignor with the assignee. And the court held, that the action was maintain

† *Moore*, 243 *S. C. Vin. Abr. Covenant*, K. 10.

‡ 1 *Roll. Abr.* 521. *S. C. Cro. Car.* 503. 505.

able by the assignee of the assignee, although the assignment was by parol only, on the ground of there being a privity of estate between the parties. That case is precisely in point in every respect. It is a direct decision that the assignee shall have the benefit of the covenant in a case parallel with that before the court; and it is to be observed, that *Coke*, who was then attorney-general, was counsel for the defendant, and he admitted that he could not object to the doctrine. It has been sufficiently shown, that to create privity of estate, there is no necessity for a part of the estate to be left in the covenantor. The cases of *Webb v. Russell*, 3 T. R. 393, and *Stokes v. Russell*, *ibid.* 678, are not applicable to the present case. In the first of those cases a man mortgaged his estate, and nothing remained in him but the equity of redemption. The mortgagor and *723] mortgagee made a lease, and the covenants for the rent and repairs were made with the mortgagor only; and it was held that the assignee of the mortgagee could not sue on the covenant, as it could not run with the land, being made with a person who had nothing in the land: in was merely a collateral covenant. In the other case also the covenant was in gross, and for that reason the plaintiff recovered.

As to the second point, where the plaintiff can recover the whole amount of the damages, it has been objected that the special damage was not properly laid in the declaration; and that even if it had been, the whole amount could not have been recovered. But it was not necessary to state special damage. The plaintiff has been ejected, and his loss in the value of the land, not as it was when assigned, but as it was at the time of the eviction. Where the damage is direct, and not consequential, there is no necessity for stating the special damage. Land may be let at first at a rent which afterwards may increase from the land becoming more valuable, by better cultivation or by improvements; and can it be said that because the land has been improved, the value of the land shall not be recovered? If the party erect buildings on the land, and be afterwards ejected, is not the injury direct? A case of consequential damage would arise where a party has entered into a contract to sell, and being evicted, is unable to perform his contract; and there the damage must be specially stated: but where the injury is direct and necessary, there is no occasion for stating the damage specially. Here the plaintiff is evicted from the land and from the buildings; his injury is the loss of all that of which he was in the possession. But supposing it to be necessary to state any thing, the declaration has stated enough to give the defendant notice. The plaintiff is entitled to *724] compensation for his loss, which he has stated to be "divers sums of money laid out and expended in altering, improving, and ornamenting the premises." The plaintiff does not seek to recover for mere fanciful loss: the estimate is not on what he may have laid out, but on the actual value to the occupier, ascertained by the opinion of a surveyor. It is submitted, that in the absence of authority, the special damage, if necessary to be stated at all, has been stated in words abundantly sufficient.

Lens and Hullock, Serjs., contra. This application is made on legal principles, it being clear that a *chose in action* cannot be assigned; the action should have been by *Corp* against the defendant. [*Dallas, C. J.* This covenant runs with the land; and the case of *Noke v. Awdler*, is precisely in point, and decisive of this question.] If the principles which have been contended for were correct, the statute, 32 H. 8. need not have passed. But there are numerous authorities to show that warranties run with the inheritance of the land only, and do not apply to chattel interests; and the case of *Noke v. Awdler* cannot be supported against those cases, and the statute 32 H. 8. If there was no distinction between a covenant for mere enjoyment, made between the assignor and assignee of a term of years, and a warranty affecting the inheritance, then that case would have great weight; but such a distinction does exist. To support this action, there must be either a privity of contract or a privity of estate between the parties. There is no pretence for attempting to show a

privity of contract; and as to the privity of estate, at common law this action could not have been maintained; nor is the statute 32 H. 8., applicable to the present case. This *covenant is merely a covenant in gross, and therefore not assignable. "It is not sufficient that a covenant is concerning [725] the land; but in order to make it run with the land, there must be a privity of estate between the covenanting parties."† Here there was no such privity of estate, for the defendant had no reversionary interest left in him. He could not have distrained for rent. There is not any case in the books in which an action similar to the present has been supported, except *Noke v. Awdler*; and that case cannot be considered to be law, otherwise the statute 32 H. 8. was unnecessary; and it is contrary to a stream of authorities, and repugnant to the judgment of the court in *Webb v. Russell*, and *Isherwood v. Oldknow*, 3 M. & S. 382: in which latter case, Lord *Ellenborough* gave it as his opinion, that an assignee of the reversion at common law was not entitled to maintain an action of covenant; and this opinion is corroborated by *Thursby v. Plant*, 1 Saund. 237, *Thrale v. Cornwall*, 1 Wils. 165, *Barker v. Demer*, 3 Mod. 337, and *Webb v. Russell*. *Middlemore v. Goodale* is distinguishable from the present case, as that was a case of a covenant by the vendor of the fee; here the defendant was a termor only. And in *Spencer's* 5 Rep. 17. case it was resolved, "that if a man leases sheep or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns, at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them, and the lessee assigns the sheep over, this covenant shall not bind the assignee; for it is but a personal contract, and wants *such privity as is between the lessor and lessee, and his assigns of [726] the land, in respect of the reversion. But in the case of a lease of personal goods, there is not any privity, nor any reversion, but merely a thing in action in the personalty which cannot bind any but the covenantor, his executors, or administrators, who represent him."

As to the second point, the plaintiff cannot recover more than 380*l.*, the value of the premises at the time of the assignment. The defendant is not to become answerable for the arbitrary improvements made by the plaintiff; and as to the buildings, they cannot be considered as having been erected for the improvement of the land. Besides, the plaintiff has confined himself by his declaration to such improvements as were for the benefit of the land. The damages laid in the declaration did not arise by reason of the breach of covenant. The plaintiff there merely states that he had expended money about the altering, improving, and ornamenting the "same premises," which may mean the improvement of the land, but cannot include the erection of buildings. These improvements had no existence when *Corp* made the assignment; and the claim of the plaintiff must be confined to the original value of the land.

Bosanquet, Serjt., in reply, observed, that as to the first point, the only question was, whether the covenant ran with the land. If it did, the assignee of the land to which it was annexed could maintain an action upon it. He observed, that the statute 32 H. 8. applies to the case of a grantee of a reversion only, it not being clear what covenants were annexed to a reversion, whereas here the covenant ran with the land.

*DALLAS, C. J. This case has been argued ably, and much at length; but the question appears to me to lie in a very narrow compass. *Bar-* [727] *clay*, demised the premises to the defendant, and he assigned his interest to *Corp*, who assigned to the plaintiff. Upon the assignment to *Corp*, by the defendant, he covenanted with *Corp*, and his assigns for the quiet enjoyment of the premises. Upon this covenant an action is brought by the plaintiff, the assignee of *Corp*; and the question is, whether the covenant runs with the land. I am decidedly of opinion that it does run with the land. This covenant applies

† By Lord *Kenyon*, C. J., in *Webb v. Russell*, 3 T. R. 402.

specifically to the land, and runs with it, thereby creating a privity of estate between the parties. In cases of the inheritance being conveyed, it is clear, and has been admitted, that such a covenant runs with the land; and I cannot see upon what principle a distinction is made as to terms for years. In the case of *Noke v. Auder*, if such a distinction could have been made, *Coke*, the counsel for the defendant, would not have failed to have made the objection; but he admitted that he could not deny the doctrine there contended for: and that case is precisely in point.

Then, as to the second point, I very much doubt whether in any case a plaintiff can recover for the improvements and buildings he may choose to make and erect upon the lands; but whether damages in respect of money expended in such improvements and buildings can or cannot in any case be recovered, I am of opinion that they cannot be recovered in this case, as the declaration is insufficient.

PARK, J. The first question is, whether this covenant does or does not run with the land; and I am clearly of opinion that it does. This case is not at all affected by the statute 32 H. 8. *Noke v. Auder*, was decided many years *728] after that statute had passed; and *considering who the counsel were who argued that case, it would be singular, if there had been any ground for making the objection now urged, that it should not have then been made. *Middlemore v. Goodale*, is also a strong authority. The point upon which that case was decided certainly does not apply to the present case; but the court expressly stated their grounds of decision, and gave their opinion upon the question now before us. But it is impossible to distinguish this case from *Noke v. Auder*; and, relying on that case, I do not think there is any reason why we should arrest the judgment.

Upon the question of the amount of damages, they should, in my opinion, be reduced to 300*l*. The plaintiff has not stated the damage in his declaration so as to entitle himself to more than that sum. He has stated that he has laid out money in altering, improving, and ornamenting the "same premises," which can refer to the land only, and not to the buildings.

BURROUGH, J. *Noke v. Auder*, is similar in every respect to the present case, and it would be going too far to say that that case was not correctly decided. I am of opinion that it was rightly decided; and that, as this action is brought upon a covenant which runs with the land, by an assignee of the land, the plaintiff is clearly entitled to recover.

RICHARDSON, J. I fully concur in the opinions which have been expressed, and cannot see any danger of misconstruing the statute 32 H. 8. or overruling the cases decided by the common law, by holding this action to be well brought. The statute 32 H. 8. does not affect this case; it refers only to the remedies for and against the grantees and assignees of the reversion. It does not apply to remedies between lessors and the assignees of lessees. Those cases are provided for by the common law. The law upon the statute is very well laid *729] down *by Mr. Serjt. Williams, in his notes to *Thursby v. Plant*; 1 Saund. 241, but the present case is foreign to that statute: this action is not against the grantee of the reversion, but against the party who made the covenant. In *Middlemore v. Goodale*, it was held that D., to whom the lands had been conveyed, might maintain an action of covenant against A., by the common law, as assignee of B., to whom the lands were conveyed, and with whom the covenant was entered into. No distinction can be drawn between an assignment of a term for years in lands and a conveyance in fee. Besides, *Noke v. Auder*, is expressly in point. King, there stands in the situation of *Barclay*, in this case, and his assignee entered into the same covenant as this. The action was there brought by the assignee of the assignee of the lessee against the assignor. That case is on all-fours with the present case; and neither *Coke*, the counsel for the defendant, nor the court, adverted to the point contended for in this case, which they certainly would have done, had the objection been tenable.

As to the damages, they must stand at 300*l*. It appears from the evidence, that the improvements consisted in the conversion of the lands into pleasure-grounds, and the erecting of buildings. I do not give any opinion, whether the improvement of the land would in any case be considered in ascertaining the amount of damages; but I think it sufficient to say, that in the form in which the special damage is assigned in the declaration, the value of the buildings cannot be recovered. The special damage has not been sufficiently stated in the declaration to entitle the plaintiff to recover more than the 300*l*.

Rule as to the arrest of judgment discharged; but, as to the reduction of the damages to 300*l*., absolute.

*HALE v. SMALL, et al.

[*730]

[2 Moore 58. S. C.]

Where a party was described in a commission of bankrupt as a dealer in a particular trade, and the evidence of dealing was in a different trade, the court allowed a new trial on the ground of surprise.

TRESPASS for entering the plaintiff's house and taking his goods. Plea, not guilty. The action was brought against the assignees, under a commission of bankrupt, which issued against the plaintiff in *January*, 1817, for the purpose of trying the validity of the commission, in which the plaintiff was described as "*Edward Hale, of West Worldham, in the county of Southampton, dealer in cattle*, using and exercising the trade of merchandise, by way of bargaining, exchange, bartering and chevisance, seeking his trade of living by buying and selling." It appeared in evidence, that the plaintiff, who was a farmer, was in the habit of buying and selling sheep, and it was also proved that he was in the habit of dealing in hops. For the plaintiff it was urged, on the authority of *Bolton v. Sowerby*, 11 East, 274, *Stewart v. Ball*, 2 N. R. 78, and *Mills v. Hughes*, Willes, 588, that the dealing in cattle was necessary for the purposes of his farm, and that he was not, therefore, a trader within the meaning of the bankrupt laws. It was contended also, that the evidence of trading must be confined to his dealings in cattle, according to the description stated in the commission, and that evidence of dealing in hops was therefore inadmissible. *Park, J.*, before whom the cause was tried at the last *Winchester*, assizes, left the case to the jury, requesting them, if they found the plaintiff a trader, to state the reason for giving their verdict; upon which they found that the plaintiff was a dealer in cattle, and a dealer in hops, and gave a verdict *for the defendants. Leave was given to plaintiff to move to set the verdict aside, if [*731 the court should be of opinion that the defendants were not entitled to retain the verdict.

Onslow, Serjt., accordingly, in the last term, had obtained a rule nisi that the verdict should be set aside, and a new trial granted, on the ground of the verdict having been given contrary to the evidence, and against law, as it had not been proved that the plaintiff was a dealer in cattle; and, that as the plaintiff had been described in the commission as a dealer in cattle only, the proof ought necessarily to have been confined to such dealing.

Pell, Serjt., now showed cause, and observed, that this was the first case in which such an objection had ever been taken, and denied that the defendants were prevented from going into evidence of other dealing, merely because the plaintiff was described in the commission as a dealer in cattle, The statute 13

Eliz. c. 7, s. 1,† is alone to be referred to, as deciding this question. That statute declares who shall be a bankrupt. It does not require that the specific trade should be necessarily stated: the words are general; there is no trade specified. In the commission, the plaintiff is described as a "dealer in cattle, using trade by bartering and chevisance." Now, in the commission, the very words of the statute are made use of; but the specific trade is also introduced. If there had been no description added, if the words "dealer in cattle" had been omitted, it would have been good. How then *can this description make
*732] it bad? There is no act of parliament making it necessary to use the words "dealer and chapman;" and although those words are constantly used, yet no use will make them necessary. The act of parliament is the best guide; and to that alone ought the attention of the court to be directed. It may be said, these other words in the commission refer to the particular trade mentioned, viz. "dealer in cattle;" but there is no authority to support such a proposition. It is admitted that the petitioning creditor's debt must be proved as in the commission; but such strict proof is not necessary of the particular dealing mentioned in the commission. It is not necessary to describe the trade, and stating the party to be a dealer in cattle cannot destroy the effect of the other words of the commission; and if the trade be described, it is not necessary to prove a trading according to the statement. "Dealer and chapman" alone have been always considered sufficient, and are used for the very purpose of letting in all trades; and the description of him as dealer in cattle cannot deceive any person, for the words "dealer and chapman" give no information whatever; and as those words alone are sufficient, it is clear that it is not necessary to give information in the commission of what the dealing is.

Lens and Onslow, Serjts., were stopped by the court.

DALLAS, C. J. The plaintiff ought to have been proved a bankrupt according to his description in the commission, of a dealer in cattle. Having been described as a dealer in cattle, he might be prepared to rebut the evidence of that dealing only, and the admission of other evidence might operate as a
*733] surprise on him. The general statement, that the *bankrupt got his living by buying and selling would have been alone sufficient to admit evidence of any particular dealing; but the parties have taken upon themselves to add a particular description in the commission, and they should have confined themselves to evidence of that only.

The rest of the court concurred.

Rule absolute.‡

† Which enacts, "That if any merchant or other person using or exercising the trade of merchandise by way of bargaining, exchange, rechange, bartering, chevisance, or otherwise, in gross or by retail, or seeking his or her trade of living by buying and selling, and being, &c., shall," &c.

‡ But see 2 *Brod. & Bing.* 25.

KIRKUS v. HODGSON.

[3 Moore 64. S. C.]

Where a verdict is taken, subject to an order of reference, if the arbitrator refuse to make his award, the court will not allow a verdict to be entered, unless the order of reference be made a rule of court.

PELL, Serjt., on a former day in this term, had obtained a rule nisi, that a verdict might be entered for the plaintiff for 20*s.* on an affidavit stating that the

plaintiff had obtained a verdict against the defendant, at the last assizes at *York*, for 5*l.*, and 40*s.* costs, subject to an order of reference; that the only question for the arbitrator to determine was, whether the verdict should stand or be reduced to 20*s.*; that the arbitrator had been duly appointed, and although he had been frequently requested to make his award, he refused to do so, and had now gone abroad.

Hullock, Serjt., now showed cause, and contended that as the order of reference still existed, the plaintiff ought to have made it a rule of court before the present application had been made. He referred to *Jamieson v. Raper*, which was before the court in the beginning of this term, and in which case, he stated that an application under circumstances precisely similar to the *present had been refused. The order of reference was made by the [734 consent of all parties, and the arbitrator might still make his award.

DALLAS, C. J. There is no power given to the arbitrator to vacate the verdict; he has merely to ascertain whether the plaintiff is entitled to retain his verdict for the smaller or larger sum. The reference was by the consent of both parties; and the court cannot have any jurisdiction to interfere in the present stage of the proceedings. Before this application can be attended to by the court, it is necessary that the order of reference should be made a rule of the court.

The rest of the court concurred.

Rule discharged.

YOUNG v. CAWDREY et al.

[3 Moore. 66. S. C., by the name of *Young v. Cordery et al.*]

All sums stated by an executor in his inventory given in to the Ecclesiastical Court as supposed to be recoverable, are assets in his hands, unless he prove a demand and refusal.

ASSUMPSIT to recover the value of certain goods. The defendants were sued as executors, and pleaded, first, the general issue; secondly, *plene administraverunt*; and, thirdly, *plene administraverunt præter* 367*l.* 15*s.* 5*d.*

The action was tried before *Park*, J., at the last assizes at *Winchester*. Much contradictory evidence as to the property of the testator in the goods was given; and the defendants, in support of their third plea, proved the inventory given in by them to the Ecclesiastical Court, which admitted the sum of 367*l.* 15*s.* 5*d.* to be due to the testator's estate, but stated that 232*l.* 8*s.* 6*d.*, the amount of certain debts supposed to be recoverable, was included in that sum. The case was left to the jury, who found a verdict for 367*l.* 15*s.* 5*d.*

**Copley*, Serjt., in the last term, had obtained a rule nisi that the verdict might be reduced by deducting the sum of 232*l.* 8*s.* 6*d.*, on the [735 ground of the debts never having been recovered.

Pell, Serjt., now showed cause, and contended, that as the sum had been stated in the inventory as the amount of debts supposed to be recoverable, the plaintiff was entitled to retain his verdict. These are sperate debts; and in *Shelly's* case, 1 Salk. 296, it is laid down by *Holt*, C. J., "that all sperate debts mentioned in the inventory shall be counted assets in the executor's hands; for that is as much as to say that they may be had for demanding, unless the demand or refusal be proved." Now in this case there is an affidavit, stating that the defendants might recover these debts if they chose to demand them. In *Buller's Nisi Prius*, 140, it is said, on the authority of

Smith v. Davis, M. 10 G. 2, that if the inventory do not distinguish between the sperate and the desperate debts, it is sufficient to charge the executor with the whole *prima facie* as assets. Upon the authority of these cases, therefore, the plaintiff is entitled to recover the whole sum.

Copley, Serjt., in support of the rule, contended that this sum could not be considered as assets, and relied upon the case of *Jenkins v. Plume*, 1 Salk. 207, in which it is said, "that if an executor brings an action and recovers judgment, the money recovered is not assets till levied by execution." To support this action it is necessary for the plaintiff to prove the payment to the defendants, or a release by them.

*736] *DALLAS, C. J. This case must be governed by the authority of the cases which have been cited on the part of the plaintiff. The defendants have, in their inventory, admitted the debts to be recoverable, and do not now deny that they are recoverable; but this case is still stronger against the defendants, for the plaintiff has produced an affidavit stating that the debts might be recovered if applied for. I am clearly of opinion that the plaintiff is entitled to retain his verdict.

The rest of the court concurred.

Rule discharged.

O'LAWLER v. MACDONALD.

[3 Moore 77. S. C., by the name of *O'Laughla v. Macdonald*.]

A British officer serving abroad under a foreign power, not compellable to give security for costs.

VAUGHAN, Serjt., moved for a rule, calling on the plaintiff to give security for costs, on an affidavit, stating that the plaintiff had no residence in *England*, and had left the country to take a command in the insurgent army in *South America*.

DALLAS, C. J. You must make him a foreigner to bring him within the rule. Officers of the *British* army who have gone to join foreign powers are not to be considered foreigners. In *Tullock v. Crowley*, Ante, i. 18, a motion for a rule to compel an *Englishman*, then a prisoner in *France*, to give security for costs, was refused.

Rule refused.

*737]

*ANONYMOUS.

[3 Moore 78. S. C.]

Security for costs is not required from a person while in this country, although usually residing abroad.

VAUGHAN, Serjt., moved for a rule to compel the plaintiff to give security for costs, on an affidavit, stating that he was usually resident in *Dantzic*, although at present in this country, and that he was soon going abroad.

The court refused to grant the rule, as the party was now residing in this country, and mentioned the case of *Ciragno v. Hassan*, Ante, vi. 20, in which it was held, that security for costs was not required, so long as the party remained in the country.

Rule refused.

WELLS v. GIRLING.

[3 Moore 79. S. C.]

An action cannot be supported upon the common money counts against one of the makers of a promissory note, who signed it as a surety only for the other maker.

ASSUMPSIT. The defendant was one of the makers of a promissory note, upon which the action was brought. The note was made payable by four instalments. The declaration contained, besides the money counts, one count on the note, which stated the last instalment to be payable on the 21st of *June*, instead of the 24th of *June*, as in the note. At the trial before *Dallas*, C. J., at *Westminster*, at the sittings after the last term, upon an objection being made to the plaintiff's right to recover, as there was a variance between the note and the declaration, it was contended, that he could recover on the money counts, and that the note might be given in evidence for that purpose. [738] It appeared, however, that the defendant had signed the note as a surety for the other maker; that no consideration had passed to him from the plaintiff, and that they had not had any dealings together. *Dallas*, C. J., was of opinion that the plaintiff could not recover, either upon the count upon the note, or upon the money counts: but the jury found for the plaintiff upon the money counts; upon which leave was given to the defendants to move to set aside the verdict.

Copley, Serjt., on a former day in this term, had obtained a rule nisi accordingly, and cited the judgment of *Eyre*, C. B., in *Gibson v. Minet*, 1 H. Bl. 569.

Vaughan, Serjt., now showed cause, and relied on the cases of *Dimsdale v. Lancaster*, 4 Esp. N. P. C. 201, *Waynam v. Bend*, 1 Campb. 175, and *Thompson v. Morgan*, 3 Campb. 161.

DALLAS, C. J. It is clear that the variance on the first count is fatal; and I am of opinion that the plaintiff cannot recover on the money counts. The presumption of the existence of a debt, which would otherwise arise, is repelled in this case; for it has been shown that there was no antecedent dealing, and that the defendant attached his signature as a surety only. There was no antecedent debt, neither was there any consideration between the parties to this action, and the plaintiff cannot support it.

The rest of the court concurred.

Rule absolute.

*GRAY v. MILNER.

[3 Moore. 90. S. C.]

An instrument was drawn, payable to the drawer or his order at a particular place, without being addressed to any person by name, and was afterwards accepted by the person residing at the place where it was made payable: Held, that the acceptor was liable in an action upon such instrument as a bill of exchange.

ASSUMPSIT. The action was brought by the indorsee of the following bill of exchange, against the defendant, as acceptor.

“May 20, 1813.

“Two months after date, pay to me, or my order, the sum of thirty pounds, two shillings.

“W. Sustanance.

“Payable at No. 1, *Wilmot-street*, opposite the *Lamb*, *Bethnal-green*, *London*.”

The words “Accepted, *Charles Milner*,” were written across the bill, and *Sustanance* had indorsed it to the plaintiff.

The declaration contained two counts upon the bill. The first stated that *Sustanance*, according to the usage and custom of merchants, made his certain bill of exchange, and thereby requested the defendant, two months after the date thereof, to pay to him, or his order, the sum of 30*l.* 2*s.*, and made the same bill payable at No. 1, *Wilmot-street*, opposite the *Lamb*, *Bethnal-green*, *London*; that the defendant accepted the same, and that *Sustanance* indorsed it to the plaintiff. It then averred the presentment for payment, and refusal. The second count stated, that *Sustanance* made his certain other bill, and thereby required, two months after the date thereof, the payment to himself, or his order, of the sum of 30*l.* 2*s.*, and that the defendant accepted the same, and that *Sustanance* indorsed it to the plaintiff.

At the trial before *Dallas*, C. J., at *Westminster*, at the sittings after the last term, it was objected, that the instrument *not being directed to any person, was not a bill of exchange, according to the custom of merchants; that the first count could not be supported, as it stated that the drawer, by the instrument, requested the defendant to pay, whereas in fact the defendant was not named in it; that the second count did not state the defendant to be the person drawn upon, but merely stated his general acceptance, and omitted to notice that the instrument was made payable at a particular place. The jury found for the plaintiff, and the objections were reserved for the opinion of the court.

Copley, Serjt., on a former day in this term, had accordingly, upon these objections, obtained a rule *nisi* that the verdict might be set aside and a nonsuit entered; and mentioned, that in a former action which had been brought upon the same instrument in the Court of *King's Bench*, the plaintiff had failed, in consequence of the declaration having stated, that the drawer, by the bill, requested the defendant to pay, as the court held that, the defendant not being named in the bill, the declaration was not supported by the instrument. He relied on the cases of *Gammon v. Schmoll*, Ante, v. 344. S. C. 1 Marshall, 80, *Callaghan v. Aylett*, Ante, iii. 397, and *Sanderson v. Bowes*, 14 East, 500, to show the necessity of averring a presentment at the particular place where the instrument is made payable.

Vaughan, Serjt., showed cause on a subsequent day. As to the objection of the bill not being directed to any person, it cannot now be sustained; for the defendant having accepted the bill, has thereby admitted that he was the person to whom the bill was addressed. That this is a bill of exchange, and may be declared on as such, the cases of *Stuhlteworth v. Stephens*, 1 Campb. 407, and

**Allan v. Mawson*, 4 Campb. 115, sufficiently prove. Although at first a drawee was wanting, yet, in the instant of acceptance, it became a perfect instrument.

Blossel, Serjt., in the absence of *Copley*, Serjt., in support of the rule, contended that this instrument could not be considered a bill of exchange, according to the usage and custom of merchants; neither is the defendant, according to such usage and custom, liable to pay, for an instrument not directed to any person cannot be a bill of exchange. The two cases cited on the other side are not conclusive: the judges there do not hold the instruments to be bills of exchange as not being addressed to any person, but because they consider them virtually addressed to drawees. In those cases the names of the drawees appeared on the bills; here no name appeared, which creates a broad distinction between those cases and the present. The second count cannot be sustained as the cases cited expressly decide the averment of presentment to be necessary.

Cur. adv. vult.

DALLAS, C. J., on this day stated, that the opinion of the court was, that the instrument upon which this action was brought was clearly a bill of exchange, and could be declared upon as such; that it was not necessary that the name of the party who afterwards accepted the bill should have been inserted, it being directed to a particular place, which could only mean to the person who resided there; and that the defendant, by accepting it, acknowledged that he was the person to whom it was directed; and that the plaintiff, therefore, was entitled to retain his verdict.

Rule discharged.

*CLARK et al. v. CALVERT.

[*742]

[3 Moore 96. S. C.]

Trespass *quare clausum fregit* may be maintained against a stranger by a tenant of the land for a trespass committed before his bankruptcy.

A landlord cannot distrain for rent, trees growing in a nursery-ground.

TRESPASS. The first count of the declaration was for breaking the closes of the plaintiffs, in the parish of *Crosthwaite*, in the county of *Cumberland*, digging up the earth there, up-rooting, &c., the trees of the plaintiffs, and carrying the same away. The second count was for seizing and carrying away the trees and plants. The defendant pleaded, *first*, that the plaintiffs on the 1st of *March*, 1817, and from thence continually, until the suing out of a commission of bankrupt thereinafter mentioned, were subjects of this realm, and nursery-men, dealers and chapmen, and did use and exercise trade, &c., and sought their living by buying and selling; and that the plaintiffs, so using and exercising trade, &c. on that day, were indebted to *George Blair* and *William Plimpton*, subjects of this realm, in the sum of 100*l.*, for a debt due and owing to them from the plaintiffs; and that the plaintiffs were then also indebted to divers other persons in divers sums of money, and being so indebted, became bankrupts; and that, on the 11th of *March* following, a commission of bankruptcy, dated on the said 11th of *March*, was issued, upon the petition of *Blair* and *Plimpton*, against the plaintiffs, under which commission the plaintiffs were, on the 8th of *April* in the same year, found bankrupts: and that three of the commissioners named in the said commission, afterwards and after the committing of the said supposed trespasses in the declaration mentioned,

and before the commencement of the suit, to wit, on the 22d of *April*, 1817, by an indenture made between the commissioners *of the one part, and *743] *George Blair* and *James Gray* of the other part, did, for the considerations therein mentioned, &c., assign and set over to *Blair* and *Gray*, then duly constituted and appointed assignees of the estate and effects of the plaintiffs, all the goods, &c., and all other the personal estate whatsoever whereof the plaintiffs were possessed, interested in, or entitled to, at the time they so became bankrupts, or at any time since, and all their estate, interest, and property in the premises, or any part thereof; to hold the same to the said *Blair* and *Gray*, their executors, administrators, and assigns, in trust for the use and benefit of the creditors of the plaintiffs. The defendant then alleged, that the closes in the declaration mentioned were at the said time when, &c., and at the time of the bankruptcy, and since, held by the plaintiffs for a term of years; and that the said commissioners, in further execution of the said commission, by another indenture, after the committing of the supposed trespasses in the declaration mentioned, to wit, on the 22d of *April*, 1817, made between the commissioners of the one part, and the said *Blair* and *Gray*, assignees as aforesaid, of the other part, did, for the considerations therein mentioned, grant, bargain, and sell unto *Blair* and *Gray*, assignees as aforesaid, all the freehold and copyhold lands and hereditaments whereof or wherein the plaintiffs at the time they became bankrupts, or at any time since, had any estate, right, title, or interest in possession, remainder, reversion or expectancy, or otherwise, and all claim and demand of the plaintiffs of, in, and to the same premises; to hold the same to the use of *Blair* and *Gray*, their heirs and assigns, upon trust for the creditors of the plaintiffs as therein mentioned. And the defendant further alleged, *744] that the last-mentioned indenture was duly enrolled in the Court *of Chancery before the commencement of this suit. And so the defendant averred, that the rights of action in the declaration mentioned were by means of the premises duly assigned to *Blair* and *Gray*, and this, &c.

Secondly, as to the taking and carrying away of the trees and plants in the first count of the declaration mentioned, and the trees, plants, &c., in the last count of the declaration mentioned; a plea similar to the first, omitting the bargain and sale of the bankrupts' real estate, and concluding with the defendant's averment, that the rights of action in the declaration mentioned, as to the premises in the introductory part of that plea mentioned, were by means of the premises duly assigned to *Blair* and *Gray*, and this, &c.

Thirdly, as to the trespasses in the first and second counts mentioned; that the defendant, long before the said time, when, &c. was and still is seised of and in the said closes, in which, &c., in his demeane as of fee; and being so seised thereof, that afterwards and before the said time, when, &c., to wit, on the 25th of *March*, 1813, he, the defendant, demised the said closes, in which, &c., unto the plaintiffs: to have and to hold the same to the plaintiffs as tenants thereof to the defendant from year to year, so long as they should respectively please, the said close called the *Nursery-ground*, to be holden as and for nursery-ground, with the power and liberty of planting and raising thereon, and removing from time to time, and taking away such trees and plants as might at any time during the said demise be planted or raised on the said nursery-ground, in the way of their trade and business as nurserymen, intended to be carried on in the said demised premises, yielding and paying to the defendant the yearly rent of 70*l.*, payable half yearly, as therein mentioned, during the continuance of the demise; by *virtue of which demise the plaintiffs entered *745] into the premises, in which, &c., and were possessed thereof from thence, until and at the said time, when, &c.; and that the plaintiffs being so possessed thereof, 70*l.*, of the rent aforesaid, due and payable to the defendant for one year, ending on the 2d of *February*, 1817, was then and at the said times, when, &c., in arrear and unpaid to the defendant; for which cause he, at the said several times, when, &c., entered into the said several closes, in which, &c., in

order to distrain, and did distrain for the rent so due and in arrear to him as aforesaid, and then and there for that purpose seized and took the trees and plants in the first count of the declaration mentioned, and the trees, plants, &c., in the last count of the declaration mentioned, then being in the said close, in which, &c., called the *Nursery-ground*, for and in the name of a distress for the rent so due and in arrear to him as aforesaid, and carried away the same. And the defendant averred, that the said trees and plants were planted and raised by the plaintiffs after the said demise, and were such as they might have removed by virtue of the power and authority to them given as aforesaid, and were at the said time, when, &c., fit to be taken out of the ground, and removed, carried away, and sold, in the course of their said trade and business. And the defendant further averred, that after due notice of distress given to the plaintiffs in this behalf, and after five days had elapsed after such notice, and the said rent still remaining unpaid, the defendant, for the purpose of carrying away the same, as and for such distress, necessarily dug up and uprooted the trees and plants in the first count of the declaration mentioned, and in so doing necessarily and unavoidably dug up the earth in the said closes, doing no unnecessary damage on the occasion aforesaid; and that the defendant also removed "the trees, plants, &c., in the last count mentioned, as and for such distress, [*746 as was lawful for him to do, which were the same several trespasses, &c.

Fourth, the same as the third plea, except that it was stated, that the plaintiffs, during the continuance of the demise, and before and at the said times when, &c., used and enjoyed a part of the said closes, in which, &c., so demised as a nursery-ground, in the way of their trade and business as nurserymen, carried on therein, and planted and raised trees and plants there for sale, in the course of their said trade and business, and from time to time dug up, carried away, and sold the said trees and plants in the way of their trade and business as nurserymen, and thereby made profit of the said part of the said thereby demised closes so used, in lieu and instead of sowing and raising thereon corn and other produce of that nature. To all the pleas there was a general demurrer and joinder.

The questions raised by the demurrer were as to the first pleas, whether this action could be supported by the plaintiffs for breaking and entering their lands, and seizing and taking away their trees, they having become bankrupts after the committing of the trespasses, and before the commencement of the suit; and as to the third and fourth pleas, whether a landlord were entitled to distrain for rent, trees growing in a nurseryman's ground.

The case was argued in last *Trinity* term.

Hullock, Serjt., for the plaintiffs. The plaintiffs were in possession of the lands in question at the time of the trespass being committed, and are the only persons who can bring this action. The plaintiffs had sustained an injury, for which they had a right of action, and such right of action did not pass by the assignment of the "commissioners. It is admitted, that every description of property to which the bankrupts were entitled at the time of the [*747 bankruptcy, or to which they might become entitled previously to their obtaining their certificates, passed by the assignment; but this is merely a right of action; the bankrupts had nothing more at the time of the bankruptcy. They clearly might have maintained an action of trover; but by that form of action they could not have recovered damages proportionate to the injury sustained. But, notwithstanding the assignment, the plaintiffs might maintain trespass or trover against all persons, except their assignees. *Webb v. Ward*, 7 T. R. 296, was an action of trover by a bankrupt for the benefit of his assignees; and in *Webb v. Fox*, ib. 391, it was held, that an uncertificated bankrupt had a right to goods acquired by him after his bankruptcy against all the world but his assignees, and might maintain trover for them against a stranger. In that case it is also stated by Lord *Kenny*, that "if the plaintiff had brought an action of trespass instead of trover, his possession would have entitled him to recover

against a wrong doer, and that the form of action could not alter the law." In *Laroche v. Wakeman*, (Peake, N. P. C. 190: 3 ed.,) it was held, that if an uncertificated bankrupt carry on trade and sell goods to A., he has a good title to the goods against all persons but the assignees. And in *Fowler v. Down*, 1 B. & P. 44, the court held, that if an order for the delivery of goods in the hands of a third person be given to an uncertificated bankrupt, in payment of a debt accrued subsequently to his bankruptcy, he might maintain trover for them. The judgment of *Eyre, C. J.*, in that case applies strongly to this question. *748] "What shall be done between the bankrupt *and the assignees or creditors is one thing, and what between him and a stranger is another. This narrow ground, that a bankrupt has a right against every body but the assignees, which is maintained by authorities, is sufficient to support the verdict. It is not competent to a third person to dispute the bankrupt's title to recover, who, supposing his creditors had no claims upon him, would be entitled to his action, because whether they have such claims or not, is nothing to the stranger." But even if the action be not well brought in the names of the plaintiffs, the pleas are bad. The defendant should have stated in his pleas, that the assignees had elected to take this property; for if they do not interfere, the bankrupt clearly can recover. *Kitchen v. Bartsch*, 7 East, 53. There *Lawrence, J.*, expressly stated, that "in all the modern cases, where the action brought by the bankrupt against third persons had been sustained, it had been distinctly stated, that the bankrupt can only recover where the assignees do not interfere."

Copley, Serjt., for the defendant. By the assignment of the commissioners all the personal property of the bankrupt passes to the assignees, and all rights of action in respect of the property of the bankrupt pass also; those rights of action only which are founded on personal injuries to the bankrupt, are excepted from the operation of the assignment. Here the property of the bankrupts was affected by the trespass, and consequently, the right of action passed to the assignees. The cases which have been cited do not apply; in all of them the property was acquired or the contract entered into after the bankruptcy. In *Kitchen v. Bartsch, Le Blanc, J.*, *says, "All that the *749] courts have said in any case is, that where the assignees do not interfere, one who has contracted with the bankrupt after his bankruptcy, shall not protect himself on their account against the claim of the bankrupt." In *Smith v. Coffin*, 2 H. Bl. 444, it was held, that the right of action of the bankrupt passed to his assignees under the usual words of assignment; and in *Brandon v. Pate*, ib. 308, the court held, that the assignees of a bankrupt might recover from the winner money lost by the bankrupt before his bankruptcy at play in an action of debt upon the statute 9 Anne, c. 14. As to the pleas, it was not incumbent on the defendant to state that the assignees had taken the property. The pleas set out specially the bankruptcy and the assignment by the commissioners, which is all that is requisite. *Kinnear v. Terrant*, 15 East, 622. No averment of the assignees not having interfered is ever made in cases where the bankruptcy is specially pleaded; and these pleas are supported by all former precedents.

Hullock, in reply, observed, that in the case of *Smith v. Coffin*, the bankrupt had an existing interest in land; and that in *Brandon v. Pate*, the decision was against the opinion of *Eyre, C. J.*, and proceeded on the ground that the money which was paid by the loser, continued his money and a part of his property, and therefore, passed under the general assignment of the personal property of the bankrupt.†

Cur. adv. vult.

*750] *On this day *Dallas, C. J.*, delivered the judgment of the court. (After stating the pleadings and the questions raised by the demurrer.)

† Note. Upon the point whether a landlord can distrain for rent, trees growing in a nursery ground, *Copley, Serjt.*, urged the same grounds for supporting the distress as in *Clark v. Gaskarth*, Ante, 431.

In this case we think that the plaintiffs are entitled to recover. The case of *Brandon v. Pate*, 2 H. Bl. 308, requires consideration. That was an action brought by the assignees of a bankrupt, to recover from the winner money lost by the bankrupt before his bankruptcy, in an action of debt, founded on the statute of 9 *Anne*, c. 14. The majority of the Judges there thought, and Lord Chief Justice *Eyre* yielded to their opinion, that this right of action passed to the assignees. It was money which was to be considered as part of the bankrupt's estate, which had wrongfully passed to the winner; and as such, the assignees had a right to it, and ought in reason to have sued for it. That was a question, therefore, as to money of the bankrupt, which no doubt passed to the assignees, and they might sue as they would in trover, for any of his goods, or in *assumpsit* for any goods sold by him, or for any money received to his use. The case of *Smith v. Coffin*, 2 H. Bl. 444, determined, as to the point for which it was mentioned, that a right to bring a real action, such as a writ of entry *sur* abatement, to recover part of the real estate of the bankrupt, passed to his assignees by the usual words of assignment. The 5 *G. 2. c. 30.*, directs that the bankrupt shall disclose and discover "all such effects of which he was possessed or interested, or whereby he hath or may expect any profit, benefit, or advantage whatsoever." The statute of 13 *Eliz. c. 7.*, enables the commissioners to dispose of whatever property or interest the bankrupt "might lawfully depart withal." It was, therefore, clearly and *rightly held, by the whole Court of Common Pleas, after a very long and elaborate [*751] argument, by Mr. Serjt. *Williams*, that it was the clear policy of the bankrupt laws, that every beneficial interest which the bankrupt has, shall be disposed of for the benefit of his creditors; and as the right to those lands belonged to the bankrupt, and would turn to profit, so the legislature had determined that the assignees should bring such actions as would turn those rights into possession for the benefit of his creditors. In that case Mr. Serjt. *Williams* argued for the contrary of that which is insisted on in this case, for he contended, that the action might be brought in the name of the bankrupt, for the benefit of the creditors; but *Heath, J.*, points out the danger of allowing the bankrupt to bring actions for his property, for he says, "Suppose the bankrupt were to release his right of action, or make a fraudulent conveyance, if he were to bring the action, such release or conveyance might be set up to defeat it." Therefore, the court held that action by the assignees to be maintainable, and that infinite mischief would ensue if it were determined that every thing belonging to the bankrupt did not pass under the general words used in the assignment.

These cases, therefore, merely decide, that all the property of the bankrupt, and, consequently, all the powers to turn the property to profit, vest in the assignees. But in this case we form our opinion on the precise nature of the action, and on the ground that the assignees had not interposed as in those cases. This is an action of trespass for an injury done to the soil, and which no one can maintain but he who is in the actual possession of it. It may be extremely doubtful, whether the assignees, in their own names, could in any form of action recover for the whole of the injury sustained in *this [*752] case. The court need decide nothing as to the question, whether the assignees might be entitled to demand from the bankrupt any damages which he might recover in this action. It seems clear, that, as against all the world except the assignees, the bankrupt has a clear right of action *quare clausum fregit*. For if this were not held, and if the assignees allowed him to remain in possession of premises which he before occupied, considering them a *damnosa hereditas*, as in *Turner v. Richardson*, 7 *East*, 335, it would follow that every civil injury might be committed upon the property without any means of redress.

This subject was much considered in *Fowler v. Down*, 1 *Bos. & Pul.* 44, and though there be a difference in one fact, the general doctrine there laid down,

applies most strongly to this case. *Eyre*, C. J., there said, "What shall be done between the bankrupt and the assignees is one thing, and what between him and a stranger is another. This narrow ground, that the bankrupt has a right against every body but the assignees, which is maintained by authorities, is sufficient to support the verdict." In another place his Lordship said, "It is not competent to a third person to dispute the bankrupt's title to recover, who, supposing his creditors had no claims upon him, would be entitled to his action, because whether they have such claims or not, is nothing to the stranger." *Buller*, J., agreed, and quoted and adopted the opinion of Lord *Kenyon*, in *Laroche v. Wakeham*, that, "if the assignees take any steps to disaffirm the title, they may do so, but that if they do not, the bankrupt being the ostensible owner, may convey a title, subject to be disaffirmed; but it is not competent to third persons to make the objection." And *Heath*, J., there said, "The *753] bankrupt has a defeasible property, which none but the assignees can defeat." To the same effect is the case of *Webb v. Fox*, 7 T. R. 391. where it was held, that a bankrupt has a right to maintain an action of trover for goods against all the world but his assignees; and Lord *Kenyon*, in giving his opinion in that case, relied on *Fowler v. Down*, and said, "I am of opinion, that nobody has a right to take property from the bankrupt but those who regularly claim under the commission. I subscribe to the opinion given by the Court of Common Pleas, that the bankrupt has a right to these goods against the defendants, who are wrong doers. If the plaintiff had brought an action of trespass instead of trover, his possession would have entitled him to recover against a wrong doer, and the form of the action cannot alter the law. According to the argument for the defendant, if the bankrupt gets possession of goods after his bankruptcy, it is an invitation to all the world to scramble for the possession of them, though the assignees do not choose to dispute the question with the bankrupt;" and *Ashhurst*, J., there said, "I take the general rule to be, that a bankrupt has a right against all persons but the assignees; here a lawful possession in him is admitted, and that is sufficient against wrong doers."

It is true, that both these cases of *Fowler v. Down*, and *Webb v. Fox*, were cases of property; but that is still stronger; for if the courts so hold in cases of property, *a fortiori* would they be bound to hold so where the subject matter is a tort; and were the action is possessory, and can only be brought by him who is in the actual possession of the land. It is true, also, that in both these actions, the subject was property acquired after the bankruptcy; but in both *754] cases the bankrupts were uncertificated; and it requires no argument to prove, that, generally speaking, property acquired after the bankruptcy, and before the certificate, is the property of the creditor. This was fully settled in *Kitchen v. Bartsch*, 7 East, 53. The general doctrine was confirmed, if confirmation were necessary, by *Gibbs*, C. J., in *Cumming v. Roebuck*, 1 Holt, N. P. C. 172, where he said, "Unless the assignees interpose, the bankrupt may maintain the action; he may sue as their trustee." With this weight of authority it seems clear that the action is well brought, and that the demurrer so the first and second pleas must be allowed.

The second point, whether growing trees in a nursery-ground are distrainable for rent under 11 G. 2. c. 19. s. 8., was argued in this court in last *Trinity* term, in *Clark v. Gargath*, Ante, 431. The court there resolved, that such trees were not distrainable, and nothing has been urged to induce an alteration of that opinion. Upon both the points of this demurrer, therefore, there must be judgment for the plaintiffs. My brother *Richardson*, having been counsel in this cause, declines giving any opinion.

Judgment for the plaintiffs.

**IDLE et al., v. The ROYAL EXCHANGE Assurance Company.*

[3 Moore 115. S. C.]

An insurance was effected on the freight of a ship, and on the cargo from *Quebec* to *London*. The ship sailed from *Quebec*, and on her voyage sprung a leak, and in that state was run aground on a reef of rocks, and was in imminent danger of being carried away and destroyed. The captain, by the advice of a surveyor and of an agent for the owners, who was also a part owner himself, sold the vessel whilst in this dangerous situation. The ship was afterwards saved by the purchasers, and repaired, and brought a cargo to *London*. The jury found that, in effecting the sale, the master had acted fairly for the benefit of all concerned. In an action by the assured against the underwriters on freight for a total loss, it was held, that the captain was justified in making such sale, and that an abandonment of the freight was not necessary.

COVENANT upon a policy of assurance, dated the 22d, *August*, 1810, effected in the name of the plaintiffs, and sealed with the common seal of the defendants. "Lost or not lost, at and from *Quebec*, or the ship's port of lading in the river *St. Lawrence*, to her port of discharge in the United Kingdom, warranted to depart on or before the 13th of *November*, then next, or to depart with the convoy appointed to sail on that day, being 4500*l.* on freight of the ship *Ajax*, valued at that sum, and 2760*l.* on wood, valued at 6*l.* 6*s.* per register ton, laden on board the said ship." The time of the warranty of the ship's sailing was afterwards duly extended by an indorsement on the policy to the 21st of *November*, 1810. The plaintiffs and other persons were averred to be interested in the cargo, and the same persons, together with *William Haynes*, were averred to be interested in the freight. The plaintiffs further averred, that the said ship, with the cargo of wood on board, sailed on her voyage; and that, whilst she was proceeding on her voyage with such cargo on board, she was wholly lost by the perils of the sea. The defendants pleaded the general issue, upon which issue was joined.

*On the trial at the *London* sittings, after *Michaelmas* term, 1817, [*756 before *Dallas, J.*, the jury found that there had been a partial loss as to the cargo, (the amount whereof was referred by previous agreement between the parties, and was considered as paid into court;) and that there had been a total loss upon the freight, and gave their verdict for the plaintiffs, with 4500*l.* damages for such total loss on freight, subject to the opinion of the court as to such last mentioned loss, upon a case of which the following is the substance.

The plaintiffs with the other persons averred to be interested in the freight, were the owners of the ship *Ajax*, and, at the time of the loss, were interested in the freight to the amount of the sum insured thereon, and, together with the other persons averred to be interested in the cargo, were likewise further interested in the cargo laden on board the ship, consisting of timber for his majesty's dock-yards.

On the 16th of *November*, 1810, being within the time limited by the extended warranty, the ship set sail from *Quebec* to *London*, being her port of discharge in the United Kingdom; and, on her voyage down the river *St. Lawrence*, having by an unavoidable accident struck the ground, she immediately sprung a leak. Tempestuous weather came on, and after every endeavor had been used to get the vessel into a place of safety, and when all the crew with a number of men who had been procured from the shore to assist them, were exhausted by working at the pumps, and when there were six feet of water in the hold, and the water still gaining fast upon the crew, it became absolutely necessary for the preservation of the lives of the master and crew to run the vessel on shore; and on the 21st of *November*, she was, accordingly, run ashore in *Kamouraska* bay, about ninety miles below *Quebec*. She took the ground upon the *outside of a reef of rocks at the entrance of the bay, [*757 and the ship being situate in the tide way and immovable, was there

exposed to the full force of the river *St. Lawrence*, and in the way of the drift ice floating down the same, which ice was then beginning to form in great masses.

On the 22d of *November*, the master went to *Quebec*, and acquainted Messrs. *Mure & Jolliffe*, two of the owners who were resident there, with his misfortune; and, after his return, caused two surveys to be made upon the ship by persons of competent experience and skill; one on the 3d, and the other on the 11th of *December*; and it being the opinion of the surveyors upon both those occasions, that the ship lay in a situation of imminent peril, of being carried away and destroyed by the ice, and the surveyors upon the second survey having stated that, according to their judgment, it would be prudent and for the benefit of the insurers, merchants, and all concerned, to sell the ship and cargo as soon as possible, she being then liable to be carried away by the ice or upset; he did accordingly, and under the direction of Mr. *Mure*, a part owner of the ship and cargo, and agent at *Quebec*, for the owners thereof, proceed to a sale of the ship and cargo by public auction at *Quebec*, on the 17th of *December*, 1810, at which sale *Mure* attended. The cargo consisted of timber, which could not be got out of the ship in the situation in which she then lay. The ship and cargo were sold together in one lot, as they were then lying, for 1500*l.* currency; and the sails, rigging, boats, provisions and stores of the ship which had been brought on shore, were sold in two distinct lots for 560*l.* currency.

The jury found that the master had acted throughout the whole transaction fairly and *bona fide* for the benefit of all concerned; and that the sale was honestly, fairly, *and properly conducted and directed with a view to the

*758] interest of all parties concerned. The first intimation which the plaintiffs had, that the sale of the ship and cargo was necessary, was contained in a letter from *Mure & Jolliffe*, dated at *Quebec*, 20th of *December*, 1810, written after the sale had actually taken place, and inclosing the account of sales. This letter was not received by the plaintiffs until the 7th of *April*, 1811; and on the 9th of *April*, the clerk of the plaintiffs called at the office of the *Royal Exchange*, Assurance Company, and left with the proper person a statement of loss, containing a calculation of the loss upon the cargo, giving them credit for the salvage of the cargo, and demanding the difference of such loss, and also a total loss upon the freight, without leaving any other notice of abandonment.

The ship, contrary to all reasonable expectations, survived the winter of 1810, and, in the spring of 1811, was, at a great expense, floated and carried up to *Quebec*, by the purchasers thereof; and, after being repaired at an expense of 546*l.* 6*s.* 2*d.* currency, performed a voyage to *England*, in the summer of 1811, and brought a full cargo.

The partial loss on the cargo having been agreed to be referred, and to be considered as paid into court, the only question for the opinion of the court was, whether the plaintiffs were entitled to recover for a total loss upon the freight. If the court should be of opinion that the plaintiffs were entitled to recover for a total loss, then the verdict was to be entered for the plaintiffs for 4500*l.* as for a total loss on freight; but, if otherwise, then a verdict was to be entered for the defendants: either party was to be at liberty to turn the case into a special verdict.

*759] The parties afterwards agreed, that the case should *be turned into a special verdict at once. It was twice argued; in the last term by *Marshall*, Serjt., for the plaintiffs, and *Bosanquet*, Serjt., for the defendants; and in this term by *Lens*, Serjt., for the plaintiffs, and *Copley*, Serjt., for the defendants.

Arguments for the plaintiffs. There are two questions in this case. First, whether the captain had a right, under the circumstances of the case, to sell the ship and cargo; and, secondly, whether there ought not to have been an abandonment of the freight. The captain, exercising an honest judgment, and believing the ship and cargo to be in the utmost peril, was justified in selling

them to the highest bidder, by the necessity of his situation, and his sale is therefore binding on his owners; the peril was one of those insured against, and the underwriters are therefore liable. The captain was induced to expose her to sale, because he conceived that the chance of saving the ship and cargo might be of some value to persons upon the spot, but of no value to him or his owners. It was surely better to sell in such a case than to suffer the ship to perish (for her total destruction was hourly expected,) or to attempt to repair her at an incalculable expense. If the captain had delayed for a few days, and she had been carried away, the underwriters would have had reason to complain, that he had not done his duty. They would have had great reason to complain, if he had not complied with the advice of the agents, *Mure & Jolliffe*, one of whom was also a part owner. It has been said, that however well intended the sale was, with reference to the ship and cargo, yet that it was no benefit to the underwriters, inasmuch as it occasioned a total loss upon freight, and that, therefore, they have grounds of complaint. It was urged at the trial, that this was not for the benefit of *all concerned, as it could not be for the benefit of the underwriters upon freight; but the interest of all concerned [*760 means the interest of those concerned in the ship and cargo; and the interests of the underwriters upon freight are not to outweigh the interests of the owners of the ship and cargo. Upon this subject there are many authorities. In *Milles v. Fletcher*, Doug. 231, a., 4th ed., *Mansfield*, C. J., said, "The captain had no express order, but he had an implied authority from both sides, to do what was right and fit to be done, as none of them had agents in the place; and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this is within his contract of indemnity." The subsequent part of the judgment in that case, also applies strongly here. *Plantamour v. Staples*, 1 T. R. 611, n., is also an authority to the same effect; and *Mansfield*, C. J., there says, "That being done which was the best that could be done, the underwriters are liable;" and *Buller*, J., there confirms *Milles v. Fletcher*, and says, "It was there decided, that the captain has a general power, and is bound in duty to do the best for all concerned." The next case is that of *Underwood v. Robertson*, 4 Campb. 138. There the captain of a re-captured ship, because he could not immediately proceed, being stripped of all her hands, and not being able to procure a fresh crew immediately, sold the ship and cargo, under the order of the Vice Admiralty Court; and *Ellenborough*, C. J., held, "that he had no right to sell the cargo, and that he was bound to have waited a reasonable time, for the purpose of procuring a competent crew to navigate his vessel." From that it must be inferred, that if he had waited a reasonable time, the circumstance of the necessity which *had occasioned the sale of the ship, would then. [*761 have been justifiable. In the case of the *Betty Cathcart*, 1 Rob. Adm. Rep. 220, Sir *William Scott* said, "The revenue and navigation laws are certainly to be construed and applied with great exactness; at the same time it is not to be said, that they are not subject to all considerations of rational equity. Cases of unavoidable accident, invincible necessity, or the like, where the party could not act, otherwise than he did, or has acted at least for the best, must be considered in this system of laws just as in other systems. Laws that would not admit an equitable construction to be applied to the unavoidable misfortunes or necessities of men, or to the exercise of a fair discretion under difficulties, could not be laws framed for human societies." In the case of the *Gartitude*, 3 Rob. Adm. Rep. 257, Sir *William Scott* observed, "It is said, that the master is the mere depositary and common carrier as to the cargo, and that the whole of his relation to the goods is limited to the duties and authorities of safe custody and conveyance. This position, that in no case has he a right to bind the owners of the cargoes, is, I think not tenable to the extent in which it has been thrown out; for though, in the ordinary state of things, he is a stranger to the cargo beyond the purposes of safe custody and conveyance, yet in cases of

instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean, that valuable property in his hand is to be left without protection and care. It must unavoidably be admitted, that, in some cases, he must

*762] exercise the discretion of an authorised agent over the cargo, as *well in the prosecution of the voyage at sea, as in intermediate ports into which he may be compelled to enter." And he afterwards observes, "The law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules; and whatever is reasonable and just in such cases is likewise legal." From these authorities, it appears clearly what has been considered to be the power and authority of the captain, not only according to the common law, but also in the Court of Admiralty: and it follows, that the captain, situated in such extreme necessity as he was in this case, was authorised to act as he did, both with reference to the ship and and the cargo. *Green v. The Royal Exchange Assurance Company*† is precisely in point; in that case the jury found, and the court held, that if the captain did the best for all the parties concerned, the underwriters were liable. In this case, the jury have found that the master acted for the benefit of all concerned, and that the sale was honestly and fairly conducted and directed with a view to the interest of all concerned. Therefore, without overturning that case, the court cannot decide in favor of the defendants in this case. The authority of *Wilson v. Millar*, 2 Stark. N. P. C. 1, *Reid v. Darby*, 10 East, 143, and *Hayman v. Molton*, 5 Esp. N. P. C. 65, is fully admitted. Those cases decide, that nothing but extreme necessity will warrant the master in making a sale; but it is impossible that a case of stronger necessity than the present could exist.

The next question is, whether or not the freight should have been abandoned. To this *Gibbs*, C. J., gives a decided answer in *Green v. The Royal* *763] *Exchange Assurance Company*, namely, that there was nothing to *abandon. If the sale were right, the ship and cargo were gone into different hands, and she could never earn freight. Where the freight is abandoned to the underwriters of the ship, it belongs to them, and they become her owners from the time of the commencement of the risk; and if the ship be hypothecated for the wages of the sailors, the hypothecation follows the ship, and the underwriters take her, subject to those burthens and outgoings: they are liable for those charges after abandonment. This has been incidentally discussed in various cases. In *Thompson v. Rowcroft*, 4 East, 34, *Ellenborough*, C. J., said, "The underwriters on the ship, from the time of the abandonment to them, stand in the same situation as the owner; and as the owner was liable to all these expences before, so, after the abandonment, they must be borne by the underwriters on the ship. Expenses of this sort are not, properly speaking, salvage on the freight, but they are charges paid by the owners of the ship, for the benefit of those to whom he abandoned it. And, therefore, he will be entitled to retain a proportionable part on his settlement with them." The cases of *Leatham v. Terry*, 3 Bos. & Pull. 479, *McCarthy v. Abel*, 5 East, 386, *Sharp and Gladstone*, 7 East, 24, are all to the same effect. The opinion of *Ellenborough*, C. J., in *Parmeter v. Todhunter*, 1 Campb. 541, is at variance with these cases, but it was overruled by *Gibbs*, C. J., in *Green v. The Royal Exchange Assurance Company*, in which case it was cited. [Dallas, C. J. In *Hayman v. Molton* it was decided, that in cases of extreme necessity the captain may sell the ship for the benefit of the owners, but that it can only be in cases of *extreme necessity*. No case has been mentioned in *764] *which it has been held that the captain, even in a high degree of expediency, has a right to exercise a judgment upon the *prudence* of selling the vessel. Here all that has been stated is, that it was done upon the

surveyor's report, stating that it would be prudent to sell: it does not appear upon the special verdict that it was absolutely necessary to sell. In *Reid v. Darby* that distinction was taken.]

Arguments for the defendants. The defendants are entitled to the judgment of the court on these grounds, first, that there never has been any loss of the freight insured; secondly, that if there has been any loss, that loss has arisen from the act of the assured themselves; and, thirdly, that the plaintiffs cannot recover without abandonment.

On the first ground, *Anderson v. Wallis*, 2 M. & S. 240, is in point. It was there held that the mere retardation of a voyage could never amount to a total loss, nor could it authorise an abandonment. *Ellenborough, C. J.*, there said, that "disappointment of arrival was a new head of abandonment in insurance law;" and he afterwards adds, "there is not any case or principle which authorises an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable at the time of abandonment." However a ship may be retarded, if she finally arrive at her destination, there is no loss under the policy. But it may be said here that, although the ship arrived, it did not bring the same cargo, and, therefore, the freight was not earned. But that is answered by the case of *Everth v. Smith*, *ibid.* 278, which decided this as to freight. In that case the ship was detained, and afterwards procured freight from other persons; and it was held, that freight having been "afterwards earned, the underwriters were not liable. It makes no difference, [*765 therefore, whether the cargo be the same or not. This vessel brought a complete cargo, and earned freight, and that on the same voyage; consequently no freight was lost. But, if freight has been lost, it has been lost by the act of the assured himself; for the ship did survive the winter, brought a full cargo, and earned freight. The underwriters cannot be called upon to pay, when the ship has done all that was undertaken. *Mure & Jolliffe*, the former a part owner of the ship and cargo, and both representing the other owners, *bona fide* thought it for the benefit of all parties concerned to put an end to the adventure, and sell the ship. The ship being so transferred, the owners cannot have recourse to the underwriters for the freight. The ship was quite repairable, and there was nothing in the circumstances to prevent her completing her voyage; and there is no case in which the captain, much less the owner of a vessel, has been held to be justified in parting with a ship because she was in peril, or because she was in danger of not performing the voyage, the risk of which was insured against. The underwriter insured against the risk; and the parties can have no right to settle the risk, and then to tell the underwriter that he is bound as if the vessel had been lost by the perils of the sea. Here, no peril, but the act of the assured, actually prevented the voyage from being accomplished. It is the risk that has been sold, and not the ship, which, at the time of sale, was a good vessel. It is admitted that, as in *Miles v. Fletcher*, when the vessel is irreparable, she remains may be disposed of; and that is the principle upon which *Green v. The Royal Exchange Assurance Company* was decided. The principle is this, a captain may sell his vessel if she be so damaged that she cannot perform the voyage; but he cannot sell merely because she is in peril. In *McCarthy v. Abel, Ellenborough, C. J.*, says, "The question *appears to us to resolve itself into this single point, whether the freight have been lost or not;" and he adds, "if it [*766 have been lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an abandonment of the ship, which abandonment was the act of the assured themselves; with which, therefore, and the consequences thereof, the underwriters on freight had no concern." There has been no total loss of ship in this case; there has been no total loss of cargo; and it cannot, therefore, be contended that there has been a total loss of freight. There has been no abandonment of the ship or cargo; there could not be any abandonment, because the case never arose in which the

abandonment of the ship could have taken place. In all the cases upon this subject, the question has arisen, where a ship has been injured by the peril of the sea, and where she has been irreparably injured and the voyage lost. *Furneaux v. Bradley*,† and many other cases, turn upon the point, whether ships be or be not repairable; if not repairable for the purpose of the voyage, then the ship may be abandoned. But the case does not turn upon this; for whether there be a total loss or not, as in *McCarthy v. Abel*, as the abandonment transfers it to a third person, there can be no demand upon the underwriters on freight. As to the authority of the master to sell, it is true he may dispose of a wreck; but he cannot, under any circumstances, dispose of a ship at all capable of performing the voyage insured. In *Reid v. Darby*, the ship had undergone great peril and damage: there were proceedings in the Admiralty Court, and every thing was done *bona fide* to authorise the sale, and yet the court held that there was an alternative, and, therefore, that the captain could not sell the ship. In *Wilson v. Millar*, the judgment of *Ellenborough, C. J.*, is decisive upon this point.

*767] *As to the last part of the case, whether an abandonment be necessary or not, the case of *Green v. The Royal Exchange Assurance Company* would appear decisive, but it is now stated by the counsel for the plaintiffs, that they were in error in supposing that there was an abandonment of the ship; it is now stated that it was not so, and that the underwriters accepted a salvage and paid a total loss. This is very important, for if there has been no abandonment of the ship, then unquestionably there is no total loss of the ship; it is only a partial loss, in whatever light the parties may view it. *Thompson v. Rowcroft* and *Leatham v. Terry* are, therefore, important cases. If the owners were justified in parting with the ship to *Patterson*, it was never abandoned; in fact, the case never arose in which they were entitled to abandon. In *Hodgson v. Blackiston*, 1 Park on Ins. 281, n., it was held, that although the ship was sold, and abandonment was necessary. And in *Martin v. Crokatt*, 14 East, 466, *Ellenborough, C. J.*, said, "Where the thing insured subsists in specie, an abandonment is necessary, if it be necessary in any case; and if, upon the happening of such a peril, which suspends the voyage and induces the necessity of repair, the owners choose to make it a total loss, they ought to give notice of abandonment." The parties in this case ought to have given the underwriters an opportunity of judging for themselves.

Reply. The case of *Green v. The Royal Exchange Assurance Company* goes further than this case, because there the ship was repaired to a certain degree so as to bring home part of a cargo. *Anderson v. Wallis* was a case of a retardation of voyage, but this case is different: the necessities of the vessel called for an immediate act, and it has been shown that it was done with great
*768] deliberation after two surveys, and upon the advice *of the agents and the captain; and the jury have found that it was the best thing that could have been done for all concerned. It has been stated that the underwriters for freight were parties concerned, but that proposition cannot be supported; for in completing a sale of a ship and cargo, the captain or agent looks to the interest of the owners of the ship and cargo, and not beyond them. It has been also stated, that the underwriters having taken the risk, had a right to run the risk of the whole voyage; but the opinions of *Manfield, C. J.*, *Buller, J.*, and *Ellenborough, C. J.*, in the cases which have been cited, and of this court in *Green v. The Royal Exchange Assurance Company*, negative that position; and if so, the consequence would be, that no insurance could be safely effected. The event is not to be considered; the conduct of the parties at the time is alone to be considered. In *Green v. The Royal Exchange Assurance Company*, the ship cannot be considered as a mere wreck, for she was afterwards repaired, and brought home part of a cargo. Great reliance has been

placed by the defendants upon *Reid v. Darby*; but when well considered, that case is in favor of the plaintiffs. The opinions of *Lawrence, J.*, and *Le Blanc, J.*, are strong in their favor; and *Ellenborough, C. J.*, although he differed in opinion with the rest of the court upon this point, founded his judgment exclusively upon the circumstance of the defendants not complying with the registry acts. The decision in that case was not upon the ground of the party having no authority to sell. *Martin v. Crokatt* is altogether inapplicable to the present case. It has been decided, that in cases of extreme necessity the captain may sell; and, under the circumstances of this case, and upon the authorities which have been cited, the plaintiffs are entitled to the judgment of the court.

Cur. adv. vult.

*DALLAS, C. J., now delivered the judgment of the court.

This case has been twice argued, and most ably on both occasions. [*769 It comes before the court on a special verdict, which in substance is this. [His Lordship then stated the special verdict.] The objections made to the plaintiffs' right to recover are these: first, it is said that the captain had no right to sell the vessel, and so determine the voyage, or in other words, that the voyage was not put an end to by the perils of the sea, but by the act of the assured; and, secondly, that if the sale was proper, there ought to have been an abandonment of the freight. With respect to the second objection, it resolves itself into matter of form; for, under the facts found in the special verdict, inasmuch as there could be no freight to abandon, no actual benefit could be derived from abandonment in terms; and, therefore, the chief objection as against the assured's right to recover, is, that something has not been done which, if it had been done, would have placed the insurer in no better situation.

The first objection then is, that the captain had no right to sell; and, as to this, the argument has gone upon very wide grounds, and a great number of cases have been referred to. But, before going into the general doctrine or the particular authorities, I think it right to premise, that our opinions must be considered as formed on the facts of this case; for, although general principles are highly valuable when they can be of general or extensive application, yet, from the very nature of subjects of this description, the application of principles as far as decided cases furnish any rule, must depend upon the circumstances of the particular case.

To proceed, then, to the first objection: had the captain a right to sell so as to bind the insurer on the facts of the case before us? This involves, first, the *general right of the captain to sell; and, secondly, the peculiar facts [770 as affecting the exercise of such right. The first view taken of the subject has been as to the right, and the extent of such right, as it may become a question between the captain and his owners, or between the original owners and a purchaser, who may derive title under a sale by the captain. Many cases have been cited upon this part of the subject; the first I shall allude to were those of the *Betty Cathcart*,† of the *Gratitude*,‡ and *Reid v. Darby*, 10 East, 143: other cases were also cited in this part of the argument, which will be mentioned hereafter. It may be necessary, therefore, first to consider the doctrine, and next to examine how far it is applicable to the present case. With respect to the general policy of the rule as to the right of the captain to sell, in my brother *Marshall's Treatise on Insurance*,§ this question will be found to be treated at large, and also in Lord Chief Justice *Abbott's* book on *Shipping*;|| and to the cases cited in both I shall generally refer.

Several foreign ordinances¶ expressly declare, that the master shall not sell

† 1 Rob. Adm. Rep. 220.

§ Vol. ii. tit. Abandonment.

¶ Consolato, D. M. ch. 253. *Laws of Oleron*, art. 1; of *Wisbuy*, art. 13; of the *Hanse Towns*, art. 57. *French Ordinance*, liv. 2 tit. 1. *Du Capitaine*, art. 19. *Ordin. of Rotterdam*, art. 165. & *Magens*, 107.

‡ 3 Rob. Adm. Rep. 240.

|| Part 1. chap. 1. 4th edit.

without a special authority from the owners; and Sir *Matthew Hale*, in conformity to such regulations, is reported to have decided† that the sale of a ship by the master did not convey the property to the buyer, although the sale was made in a foreign country, in a case of inevitable danger, the ship and tackle being beaten and broken, and no hope of saving any part of them, partly on *771] account of the tempest, *and partly on account of the barbarity of the inhabitants of that country, who carried off every thing that was cast on shore. 'This case is certainly very strong, and so much so, that it has suggested a doubt of the accuracy of the report; for, in observing upon it, Lord Chief Justice *Abbott* says,‡ "Perhaps, however, there might in this case be some circumstances, not noticed by the reporter, which might lead the learned Judge to doubt the absolute necessity of a sale, or to think the buyer a party to the misconduct mentioned in the book." 'This doctrine seems, however, to have been confirmed in the subsequent case of *Johnson v. Shippen*, 2 Ld. Raym. 984; in which Lord *Holt* is reported to have said, "The master has no authority to sell any part of the ship, and his sale transfers no property." 'Though as to this, it is to be remarked, that on looking to the facts of that case, it did not turn on the point of necessity, but on a distinction between hypothecating and selling; for hypothecation would have been sufficient, and for necessary repairs it was admitted that this might be done. In a subsequent case, however, though *Ellenborough*, C. J., seemed disposed to admit the right of the master to sell in a case of extreme necessity, (and the instance which he puts, is of a wreck which cannot be got off,) yet his Lordship offered to reserve the question of the master's power to sell under any circumstances, if the verdict should render it necessary. In the case of *Reid v. Darby*, 10 East, 157, his Lordship also quoted the authority of Lord *Holt* as to the master's having no such right. In the case of *Hayman v. Molton*, 5 Esp. 65, he again expressed himself in these terms: "Where a cause of urgent necessity and extraordinary difficulty occurs, where a ship has received irremedial injury, I *772] am disposed to go as *far as I can to support what has been contended for; namely, that the captain acting *bona fide* and for the benefit of the owners, might sell the ship. 'This is the disposition of my mind, but I cannot lay it down as positive law." In *Wilson v. Millar*, 2 Stark, N. P. C. 3, his Lordship expressed himself to the same effect.

It is, therefore, certainly true, that even the right to sell, as between the captain and the owners, has been deemed of a very questionable nature; although upon the whole, extracting from the books what seems to be the weight of authority, I conceive that the right to sell must be considered to exist in cases of extreme necessity; a right, however, which, in all cases, must be strictly watched. Supposing, therefore, this to be a sale made for the benefit of the absent owners, the question is,—was it made under circumstances of justifiable necessity?

I shall now advert, in addition to the authorities to which I have already referred, to the cases cited to prove the contrary; and of these the first is that of *Reid v. Darby*, where the question was, whether, upon the facts of that case, the master had a right to sell; and the circumstances were these: The master, on an affidavit that the ship had received considerable damage, procured a survey to be made, under the authority of the Vice Admiralty Court; and by a decree of that court the ship was finally sold. 'The Court of King's Bench held, that such sale did not divest the right of the original owner: first, because the captain had no right to sell, under the circumstances of the particular case; and, secondly, that the Court of Vice Admiralty had no jurisdiction or authority to order a sale. 'The judgment in that case could not, therefore, be different; for there was no sufficient evidence of a necessity to sell, *773] *except from the proceedings in the Vice Admiralty Court, which court was held to have no jurisdiction to inquire into the necessity: it stood

† *Tremenhere et Tresillion*, 1 Sid. 452.

‡ *Abbott on Shipping*, p. 2. 4th edit.

upon the fact of a mere sale by the master, and there was no proof of a necessity for such sale, except what the master himself had sworn. But in this case there is supplied all that was wanting in *Reid v. Darby*; first, the precise degree of peril in which the ship was placed; and next, the finding of a special jury: not, like the Court of Vice Admiralty, having no jurisdiction, but having jurisdiction, and, in the exercise of that jurisdiction, having found the degree of peril to have been such as to have induced and justified the sale.

Another case has been cited to prove the right to sell to be at least doubtful, be the circumstances what they may. I have already adverted to it; and there Lord *Ellenborough* thus lays down the true line, as to the degree and measure of necessity: "A sale can only be justified by extreme necessity, and the most pure good faith; that is, if the vessel is in such a state as it would be probable that the owners themselves, if on the spot, would have acted in the same way as the captain has done, and have sold the ship. I shall, therefore, leave it to the jury to say, whether there existed such a necessity as called upon the captain, acting for the benefit of his owners, to sell the ship; and if there did, whether this was a fair sale, and unmixed with any fraud." And, after specifying the course which he thinks ought to have been pursued, but which was not, his Lordship adds, "If this had been done and failed, the necessity of selling would have been more pressing; and I think the captain should have sold." But before I quit this case, I will only further observe, that if the jury had found, upon the question so put to them, in the affirmative, or rather that the peril induced and justified the necessity, they [774] would have found, not only in substance but in terms, what is found in this special verdict: but, finding the sale to be fraudulent, they disposed of the doubt; for the selling fraudulently, excluded the necessity to sell, or rendered the sale void.

I have observed thus far on the case before us, as if it were a question between the former owners on a sale by the captain and the vendee, only for the sake of the general doctrine, as I shall have to apply it; and further, that in a case which is stated to be of great consequence to the maritime and insurance law, I may not be thought to have overlooked the decisions referred to at the bar. But, in truth, this is not a case of implied authority from the owner; for the owner himself was personally present, and is found to have concurred in the sale. And this leads me to consider a different point, namely, that this was not a sale by the captain, but by the owner; and it is asked, can the insured have a right to sell for the insurer? To this I answer, first, that it was not the less a sale by the captain because one of the owners being present on the spot concurred: and, if it were necessary, it might, as to this, be observed, that ownership in a ship is not like the cases of joint concern or partnership; for one owner cannot bind the rest. So that substantially this was a sale by the captain, and so the special verdict finds; but it also further finds, that the owner on the spot was the agent of the absent owners. No question can arise, therefore, upon implied authority, nor upon the effect of the sale, as between the former and the actual proprietor; but I should further say, that, on the broad ground of a power to act on a sudden emergency, in order to save as much as could be saved from impending ruin, whether the sale be by the owner or the captain will make no difference, *if the circumstances [775] justified the selling, and the sale was honestly and fairly conducted.

And now, passing from this line of cases, I am come to that which constitutes the precise point on the present occasion, viz. a question between the insurer and the insured, which I conceive to stand on principles essentially different. In the case of *Hamilton v. Mendes*, 2 Burr. 1198; 1 W. Bl. 276. S. C., the distinction is broadly marked. "Arbitrary notions concerning the change of property by a capture, as between the former owner and a recaptor or vendee, ought never (said Lord *Mansfield*) to be the rule of deci-

† *Hayman v. Molten*, 5 Esp. 65.

sion, as between the insurer and insured, upon a contract of indemnity, contrary to the real truth of the fact." Let us advert, therefore, now, to cases of this description. In *Milles v. Fletcher*, 1 Doug. 231, a., 4th edit., Lord Mansfield told the jury, "that if they were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss;" which they accordingly did. And, in another part of his Lordship's judgment, he says, "The captain, when he came to *New York*, had no express order, but he had an implied authority from both sides to do that which was fit and right to be done, as none of them had agents in the place; and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because it is within his contract of indemnity. And finally, (his Lordship added,) I left it to the jury to determine, whether what the captain had done was for the benefit of the concerned; and if they had found that it was in words, where would have been the question of law?"

Observations have been made upon the meaning of the words, "for the benefit of all concerned;" but *the distinctions attempted to be drawn
 *776] appear to me to be without difference. Nor does it appear to me, that there is any thing in the distinction made between insurance on ship and goods, and insurance on freight. It is said, what has been done could not be for the benefit of the insurer on freight, which must be lost by this proceeding; whereas, if nothing had been done, the ship might have earned her freight, and the insurers have been discharged. And in the events which have happened, so it would have been; but the master is to look to the chief general interest: that is the ship and cargo; and it would be strange to say, that he must suffer these to prove a total loss to the insured or the insurer, because, by abandonment or sale, the insurer upon freight may have the loss as depending upon freight cast upon him. If this be a necessary consequence of a sale justified in all other respects, it justifies it in this also. The freight is, from its very nature, incident to, and dependent upon the fate of the ship; and in this case, as in every other, parties must be taken to have contracted according to the nature and necessity of the thing.

The authority of *Milles v. Fletcher*, has been recognised in a great number of subsequent cases, and has never, that I am aware of, been in the slightest degree impeached. In *Plantamour v. Staples*, 1 T. R. 611. n., the doctrine contained therein is adopted by Mr. Justice Buller, who states, that "in *Milles v. Fletcher* it was decided that the captain has a general power, and is bound in duty to do the best for all concerned;" and it need not be eventually for such benefit: it is sufficient that, exercising an honest judgment, he deems it so at the time." I will, now, again refer to the terms in which, in *Hayman v.*
 *777] *Molton*, Lord *Ellenborough* expressed his opinion; *and I shall only further mention *Green v. The Royal Exchange Assurance Company*,† in which it was held, that the underwriter would be bound upon a sale fairly conducted, and it only went to the jury on the second trial on that question. The judgment of *Gibbs, C. J.*, in granting the rule, shows the opinion of the court to have been, that if the captain acted fairly and with a view to their benefit, the insurers were bound by the sale: and, it is to be noted, that case, like the present, was an insurance on freight.

This weight of authority is decisive beyond all doubt, unless the present case can be distinguished. It will be necessary, therefore, to advert to the facts of the several cases, and see whether they are in this respect distinguishable in principle from the present: and the distinction is said to be, that in all the former cases the peril had not only attached, but had induced as its consequence actual injury; but, that here no actual or adequate damage had happened to

† *Ante*, vi. 68. S. C. 1 *Marsh.* 447.

justify the sale; that it all rested in chance and contingency, which form the very nature of the contract the insurer takes upon himself.

Risk, it has been said, is the underwriter's daily bread, and that no person has a right to determine that risk for the underwriter and place himself in his situation; but to this reasoning I cannot subscribe. The underwriter, before the voyage commences, and whilst the ship is in perfect safety, takes his chance of all possible peril; but when the actual peril has taken place, and is impending, and the subject matter of insurance is in the jaws of destruction, the speculation is entirely changed; and when the assured can no longer act for himself in estimating the degree of danger, nor give directions what shall be done, the question is, whether it be not a benefit to him to vest in some person a power to save *from probable destruction all that can possibly or probably be saved. Apply this principle to the present case; but, first, let the facts [*778 of the former cases be examined: and, without going through the detail, it may at once be admitted, that in every former case the peril of the sea had to a certain degree attached, and brought the ship into that state in which abandonment or sale took place by the assured; but here it is said, that the loss arose out of the act of the owner in selling, and that the sale was not induced by any peril of the sea. This distinction seems to me, also, to be a fallacy: the state of the ship which led to the sale was induced by the perils of the sea; she had incurred damage in the course of her voyage, which made it necessary to run her on shore, and she was stranded at the time; there was no reason for supposing she would have been got off the rocks, but, on the contrary, every probability of her going to destruction, which, of itself, authorised the assured to treat the voyage as at end: so that, though the sale arose immediately out of the act of the captain, yet that act was induced by a peril which had taken place, and put the ship into a state in which the verdict finds, that, in point of fact, it was proper to sell. The remote and proximate causes are not to be distinguished in point of effect: in this situation the interest of the assurer was consulted, and, the captain acting for the best, the ship was sold.

The case of *McCarthy v. Abel*, 5 East, 388, has been referred to, and much relied on for these general words made use of by Lord *Ellenborough*: "If the fact be merely looked at, freight, in the events which have happened, has not been lost, but has been fully and entirely earned, and received by or on the behalf of the plaintiffs the assured." But in this case it is the reverse; the freight, *in the events which have happened, has been lost to the assured. His Lordship then proceeded: "But if it can be considered as having [*779 been in any other manner or sense lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an abandonment of the ship, which abandonment was the act of the assured themselves; with which, therefore, and the consequences thereof, the underwriters on freight have no concern." And so, taken without reference to the facts of the case, these words may seem to have application; but in truth they have none; for they apply to a case in which the decision goes upon the very ground that the assured had no right to abandon, the ship itself being in safety at the time; and further, on the fact that the cargo in the same ship belonging to the same owners did ultimately perform the voyage so as to have gained freight for the owners, and, therefore, that they had not a right to abandon, and change a partial into a total loss. In the present case I may again observe, the ship and cargo were not in safety, but in the greatest peril, and the sale was with a view to the preservation of a part, and, therefore, for the benefit of the assurer and not the assured; and, in result, no freight whatever was earned by the former owners of the ship and cargo. Had the ship and cargo here not been in the state of peril found by the special verdict, but continued the property of the same owners, and had the same voyage, with delay only, been ultimately performed, the case of *McCarthy v. Abel* would have applied to the present; but,

according to the facts to which that decision was confined, it seems to me to have no application whatever.

The next case which has been cited is that of *Anderson v. Wallis*, 2 M. & S. 240. The ship there met with very bad *weather in the course of her voyage, sustained much damage, and was obliged to bear up for Cork, and run into *Kinsale* harbor; when, upon a survey, she was found to be in so bad a state as to render it necessary to undergo a thorough repair, and that the whole of the cargo should be unloaded. The repairs could not be finished so as to enable the ship to leave *Kinsale* in time to reach *Quebec* that season; nor could any other ship be procured to forward the cargo in time; so that the voyage was abandoned, and the captain sailed on another voyage. It was further proved that, if another ship could have been procured, it would not have been possible to have prosecuted the voyage that season; for that, after the middle of *November*, it is impossible for any ship to enter the river *St. Lawrence*, it being about that time so full of ice that it is almost certain destruction for a ship to make the attempt. These were the facts of that case; and the argument at the bar went upon the ground that, as the ship subsisted and was in safety, and within the management and control of the agent of the assured at the time, she ought to have been repaired; and therefore the assured had no right to abandon. It was said to be a retardation merely, and not a total frustration of the voyage; and was distinguished in this respect from the case of *Manning v. Neunhum*,† where the ship had received irreparable damage, and the cargo could not have been otherwise conveyed to its place of destination; and upon these grounds the court finally held, that the facts in *Anderson v. Wallis*, constituted a mere retardation of the voyage, and that, therefore, the assured had no right to abandon. I am at a loss to assimilate *such a case with the present. When *781] the captain put an end to the voyage, as by his act he endeavored to do, the ship was lying in harbor and in perfect safety; here, the ship and cargo were out of all control, beating on the rocks in the open sea, and in danger of going to pieces every moment. The judgment of the court, in the case of *Anderson v. Wallis* went upon the ground, that the captain did not act for the best. But, in this case, the jury have found that he did act for the best; and, in circumstances, the two cases stand in direct opposition.

In one respect, however, as to what is said by *Ellenborough, C. J.*, it is a case in point in favor of the present plaintiffs; for at the conclusion of his judgment, his Lordship expresses himself in these terms: "There is not any case which authorises an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable at the time of the abandonment." And that this ship was in the highest degree of probable danger, at the time when the voyage was put an end to by the sale, is not only found by the special verdict, but has in terms been distinctly admitted at the bar. The opinion, therefore, of *Ellenborough, C. J.*, in the case of *Anderson v. Wallis*, is with the plaintiffs in this case, where it does apply; but where endeavors have been made to apply it, it fails in application. On the case of *Reid v. Darby*, 10 East, 143, I have already observed, and, considering the facts of that case, it does not bear upon the present.

I have now adverted to most of the cases cited at the bar. It is admitted, that none are in circumstances precisely similar to the present; but for the reasons given, I think those cited for the defendants fail in application, and some *782] of them become authorities the *other way; so that in the result, this case must come round to the plain and simple principle to be found in the case of *Milles v. Fletcher* impeached by none, confirmed by all the subsequent cases, and not in reason to be distinguished from the present. And there is no danger to the assurer from abiding by such a rule; he may refuse to pay,

† 1 *Park on Ins.* 260. 7th edit. S. C. 2 *Marsh on Ins.* 582., 2d edit. S. C. 2 *Campb.* 694. n.

and what is the consequence? His case will be referred to the consideration of a jury, most competent to decide, composed of men both of commercial and nautical knowledge, some of them ship-owners, others insurers, bringing to the investigation knowledge and experience: forming, therefore, on the whole, a tribunal to which the investigation may be safely committed. Beyond this I need scarcely add, their judgment will at all times be liable to review, and even to the examination, if necessary, which this case has undergone.

Our opinion therefore is, that the assured are entitled to recover, unless in point of form an abandonment of freight was necessary. As to this, I shall only say, without meaning to lay down any general rule, and confining the judgment of the court to the facts before us, that we think it was not necessary in this particular case. *Green v. The Royal Exchange Assurance Company*, is admitted to be in point; and having concurred in that decision, I see no reason to alter my opinion. The consequence is, that judgment must be entered for the plaintiff.

Judgment for the plaintiff.†

† Note. As to the further proceedings in this case, see 3 Brod & Bing. 151. note (d.) [See further, as to the master's authority to sell, 5 Barn. & Ald. 617, *Freeman et al., v. East India Company*. 17 Mass. Rep. 478, *Dodge v. Union Ins. Company*. 18 Johns. 208, *Whitney v. N. York Firemen Ins. Company*. 11 Johns. 295, *Fontaine v. Phoenix Ins. Company*. 2 Johns. Cas. 252, *Robertson v. United Ins. Company*. 1 Peters' Adm. Decis. 37, *Wurden v. Goods saved*. Phillips on Insurance, 408, to 412. 5 Maule & Selw. 431, *Powell et al., v. Gudgaon*. 2 Mason's Rep. 369, *Barker v. Marine Ins. Company*. As to abandonment of freight, Phillips on Insurance, 386, & seq.]

*BROOKS, Assignee of CARBUTT, a Bankrupt, v. SOWERBY, et al. [*783

[3 Moore 157 S. C.]

Held, that a payment of a debt to a bankrupt after the issuing of the commission, though made without actual knowledge of the commission, is not protected under the stat. 1 James 1. c. 15. s. 14., the issuing of the commission being considered of itself notice to all the world of a prior act of bankruptcy. [Ante, 165.]

ASSUMPSIT. The jury found a special verdict, which was, in substance, as follows: *Carbutt*, being a trader, &c. became indebted to *Henry Butterworth*, and others, in the sum of 100*l.* and upwards, and being such trader, and so indebted, he committed an act of bankruptcy on the 27th of August, 1816; on the 7th of October, in the same year, a commission of bankruptcy issued against him on the petition of *Butterworth*, and others, under which he was afterwards found, and duly declared, a bankrupt. On the 26th of November, the plaintiff was duly chosen sole assignee of *Carbutt's* estate and effects; and on the same day, by an indenture made between three of the commissioners of the one part, and the plaintiff of the other part, and the said commissioners bargained, sold, and assigned to the plaintiff all the goods, chattles, personal estate, and effects of *Carbutt*, to hold the same in trust for the benefit of the creditors. The defendants were co-partners in trade, and whilst *Carbutt* was such trader, and before his bankruptcy, they were indebted to him in the sum of 95*l.* 4*s.* for goods sold and delivered by him to them before he became bankrupt. On the 10th of October, being after the issuing of the commission, *Carbutt*, in order to obtain payment of the same debt, sent from *Stockton*, in the county of *Durham*, where he then was, a letter directed to *Henry Thomas*, his agent at *Manchester*, in which letter he inclosed a paper stamped with a stamp for a bill of exchange in

blank, excepting that the name of *Carbutt*, was by him written thereunder as
 *784] the maker, and was also indorsed by him thereon as the indorser; *and
 by that letter he requested *Henry Thomas*, to deliver the stamp so
 signed to his (*Carbutt's*) father, and to tell him to date it back, and place it to
 his own account. The stamped paper, with *Carbutt's*, name thereon, was
 accordingly, on the 13th of *October*, delivered to his father, *Francis Carbutt*,
 at *Manchester*, and the same was on that day filled up by some person in the
 form of a bill of exchange, and it was dated back to the 4th of *October*, in the
 same year; and when it was so filled up it purported to be the bill of *Carbutt*,
 the bankrupt directed to the defendants, whereby he requested them, at four
 months after the date thereof, to pay to the order of himself 95*l.* 4*s.* value re-
 ceived, and to be duly indorsed by him. The defendants did not see the bill
 of exchange, nor had they any knowledge thereof until the 30th of *October*, on
 which day it was presented to them for acceptance in the ordinary course of
 business by a third person, who was then the *bona fide* holder thereof, and was
 by them duly accepted in order to discharge the said debt. The defendants
 had not, at any time before their acceptance of the bill, any notice that *Carbutt*
 had become a bankrupt, or that he was insolvent, or had stopped payment,
 unless the issuing of the commission should by law be deemed sufficient notice
 thereof. The notice of the commission and bankruptcy appeared in the *London*
Gazette, for the first time, on the 5th of *November*; and after the appearance
 of that notice, and after the assignment by the commissioners to the plaintiff,
 and before the bill of exchange became payable, namely, on the 14th of *Janu-*
ary, 1817, the plaintiff, as assignee of *Carbutt*, demanded from the defendants
 payment of the said sum of 95*l.* 4*s.*; but which they did not then pay, nor
 have they since paid, to him. When the bill of exchange became payable, viz.
 on the 7th of *February*, 1817, the defendants paid the sum of 95*l.* 4*s.*, therein
 *785] specified, to a third person, who was *then the *bona fide* holder thereof;
 and the sum so due from the defendants to *Carbutt*, at the time of his
 bankruptcy was not paid by them, or satisfied in any other manner than as
 above mentioned. The question for the opinion of the court was, whether the
 defendants were discharged by payment of the bill from their liability to the
 plaintiff as assignee.

The case was argued twice; first, in the last term by *Lens*, Serjt., for the
 plaintiff, and *Blosset*, Serjt., for the defendants; and afterwards in the present
 term by *Vaughan*, Serjt., for the plaintiff, and *Copley*, Serjt., for the defendants.

Arguments for the plaintiff. The question in this case is, whether the issuing
 of the commission of bankruptcy is of itself notice to all the world of a prior
 act of bankruptcy. By the statute 1 *James 1. c. 15. s. 14.*, it is provided that
 no debtor of the bankrupt shall be thereby endangered for the payment of his or
 her debt truly and *bona fide* to any bankrupt before such time as he shall under-
 stand or know that he is become a bankrupt. The only doubt is as to the mean-
 ing of the words, "understand and know;" whether an actual and personal
 knowledge is necessary to bring the case within the statute. By cases anteced-
 ent to this statute, commissions of bankrupt were treated as records, and were
 considered as such, in order to give due effect to the statute. The only distinc-
 tion to be drawn between records and commissions of bankrupt is, that the
 former were not actually published, but being on record, every person was
 bound to take notice of them. In *The case of Bankrupts*, 2 *Co. Rep.* 26, it
 is said, "the commission is matter of record, whereof every one may take con-
 sultance;" the word "may" there clearly meaning "must." In **Hitch-*
 *786] *cock v. Sedgwick*, 2 *Vern.* 156, it was held that every one was bound
 to take notice of a commission of bankruptcy when taken out. And in *Collet*
v. De Gols, Forrester, 65, it was held that a commission issued was notice of
 the bankruptcy; and the distinction was there taken between the actual issuing
 of the commission and the act of bankruptcy itself: "a commission is a public
 act, of which all are bound to take notice, but an act of bankruptcy may be so

secret as to be impossible to be known." In *Watkins v. Maund*, 3 Campb. 308, it was held that a commission of bankrupt having passed the great seal, although never opened or acted upon, was to be considered as having issued within the meaning of the 49 G. 3. c. 121., so as to be notice of a prior act of bankruptcy. It has been contended that a commission cannot be notice until published in the *Gazette*, but without foundation; for the *Gazette*, forms no part of the commission. The commission itself would be equally valid without any publication in the *Gazette*. The publication in the *Gazette*, was first introduced by the 5 G. 2. c. 30., and was merely intended as a notice of meeting to be given to the creditors, that they might come in and prove their debts, and for the choice of assignees, and the surrender of the bankrupt. Whether the defendants did or did not know that the commission had issued, is perfectly immaterial. The payment was made after the issuing of the commission; the commission having issued, was notice of the prior act of bankruptcy, and consequently the payment of this money by the defendants is not protected.

Arguments for the defendants. In every case where knowledge or understanding of the fact is required to be brought home to the party, a constructive notice is not sufficient; and under the statute *James* 1. c. 15. no constructive notice is contemplated, but the notice must be express. In [*787 this case, the party residing at a great distance from *London*, it is contended, must be taken to understand and know that the drawer of this bill is a bankrupt immediately upon the issuing of the commission. If such a proposition be maintainable, no merchant residing at a distance from *London*, can safely accept a bill or pay money without incurring the risk of a commission of bankruptcy having issued, and of being obliged to pay the money a second time. The legislature never could have intended that in this, or in any other case, an implied notice should overthrow a *bona fide* dealing between the parties. This case is not affected by the statutes of 46 G. 3. c. 135, and 49 G. 3. c. 121. The sole question is upon the statute of *James*, which was a remedial law, and is to be construed liberally towards the debtors of the bankrupt. So it was determined to be by Lord *Kenyon*, in *Wilkins v. Casey*, 7 T. R. 711, who said in that case, "the object of that statute was to protect certain payments made to a bankrupt, that common sense and justice required should be deemed valid payments, and in this instance to correct the rigor of the bankrupt laws." It cannot be considered a remedial construction of the statute, to hold that a thing shall be considered notice of which the party had no notice. The issuing of the commission is a fact, the knowledge of which at the time, could only exist between the creditors and the officer of the court. Nor is it admitted that a record is notice to all the world, as has been stated. That proposition is untenable; for those parties who have not notice of it are not bound by it. The resolutions of the Judges in the cited cases are mere *obiter dicta*, neither the subject of a record or commission *came into question, and the opinions in [*788 *Hitchcock v. Sedgwick* are not unanimous; for, Lord Commissioner *Rawlinson* there argued against the principle adopted by the other judges. The case of *Bankrupts* in *Coke's Rep.* was decided before the statute of *James* 1.; and then the bankrupt laws afforded no relief to the debtor or creditor in their transactions with the bankrupt. All things had relation to the bankruptcy; all things were void, if done after the bankruptcy, at the time that case was determined. It was not a payment made to a bankrupt, but it was a gift of goods by a bankrupt to a creditor after a commission had issued. There was no question respecting the issuing of the commission; it was not material whether it had issued or not; the conveyance having been made after the bankruptcy. the gift was void. Consequently, what was there said respecting the commission was extrajudicial; the court relied solely on the statute, 13 *Eliz.* c. 7., the gift being after the commission. The same observations apply to *Hitchcock v. Sedgwick*: it happened after the 1 *James* 1. It was not a payment to the bankrupt, but an assignment by the bankrupt, and it did not turn on the issuing of the com-

mission. The same observations are also applicable to *Collett v. De Gols*; in that case a conveyance by the bankrupt was set aside, on the ground of its having been made after the stat. 13 *Eliz.*, and not being protected by any clause in the act. These three cases stand on the same grounds; and in none of them did it make any difference whether the party did or did not know of a commission having issued. They do not therefore apply to this case. The statutes 46 & 49 *G. 3.* do not apply to this case; the notice does not extend further than to the cases therein mentioned, being expressly stated to apply only to the purposes of the act, and this case not ranging within those statutes, no argument can be gathered from the language there made use of. The case *789] of *Watkins v. Maund* was a "case upon the 49 *G. 3.*, and therefore not applicable to this case. It cannot be contended that a commission of bankrupt can be notice to persons who have never heard of it. The same arguments would apply to the registry acts; for a registry of deeds is a record. But in *Bushell v. Bushell*, 1 Sch. & Lef. 90, Lord *Redesdale*, speaking of the registry act relating to *Ireland*, 6 *Ann.*, c. 2., held that the registry could not be considered as notice. And in *Underwood v. Courtown*, 2 Sch. & Lef. 64. 65, it was held that the registry of a deed under this statute was not notice so as to make a subsequent purchaser purchase with notice. The injurious consequences of considering constructive notice sufficient are apparent; the statute clearly did not contemplate any but actual notice, and the defendants not having such notice, are therefore entitled to the judgment of the court.

In reply. On the point, whether an implied notice given by law be or be not equivalent to an actual notice, the statute is silent; and no case or *dictum* has been mentioned to show that express notice is necessary. On the other hand, the authorities cited for the plaintiff show that the commission under the great seal has been considered notice of a prior act of bankruptcy. The cases in *Coke* and *Forrester*, although not strictly applicable, as judgments, to the present case, apply as far as they go; and they contain the acknowledged principles upon which the court proceeded. Those judgments profess to consider the commission as notice to all the world. *Wilkins v. Casey*, decides nothing to affect this case. The statute 1 *James 1.* makes no such distinction as has been contended for between actual and implied notice; in opposition, therefore, *790] to the authorities in favor of the plaintiffs, the court cannot consider "any further notice necessary, under that statute, than the issuing of the commission.

Cur. adv. vult.

DALLAS, C. J. now delivered judgment.

This case comes before the court on a special verdict. It was an action by the plaintiff, as assignee of the estate and effects of *John Carbutt*, a bankrupt, to recover a sum of money claimed to be due to the bankrupt's estate, under the following circumstances. The defendant had become indebted to the bankrupt, to the amount of the sum sought to be recovered by this action, and continued so at the time when he committed an act of bankruptcy, namely, on the 27th of *August*, 1816; and on the 7th of *October* following, a commission issued, founded on such act of bankruptcy. After the issuing of the commission, viz. on the 10th of *October*, the bankrupt drew a bill on the defendants, which they accepted and paid when due; and the special verdict finds that they had not, at the time of acceptance and payment of the bill, any notice of the bankruptcy, unless the issuing of the commission is, in point of law, to be deemed notice. On the part of the defendants it is insisted, that a payment *bona fide* made, and without actual knowledge of a commission having issued, is protected by the 14th section of the statute 1 *Jac. 1.* c. 15, in which there is a provision, "that no debtor of the bankrupt be hereby endangered for the payment of his or her debt, truly and *bona fide* to any such bankrupt, before such time as he shall understand or know that he is become a bankrupt." And the question is,

whether these words, "understand or know," mean actual knowledge and understanding, as distinguished from legal and constructive notice. The clause which precedes this proviso relates to conveyances or payments made by bankrupts; as to which it enacts, that the commissioners shall have *power to grant [*791] and assign the debts due to the bankrupt to the use of the creditors of the bankrupt; and that after such grant, assignment, or disposition, neither the bankrupt nor any person shall have power to recover the same, nor to make any release or discharge thereof.

First, then, what is meant by the words "become a bankrupt?" A party becomes a bankrupt by the act of bankruptcy, and not by the commission, by which, founded on the act of bankruptcy, he is only found or declared to be a bankrupt. Now as this act, from its very nature, will most frequently be secret, it seemed reasonable not to compel a party to pay a second time, who had paid without knowledge or means of knowledge of such act. The words of the proviso, therefore, refer to the want of understanding and knowledge as to the party becoming bankrupt; that is, as to the act by which he so becomes bankrupt. By the issuing of the commission, an act which was before secret in its nature is proclaimed to the world, and the debtor, at least, may have knowledge by inquiry; whereas no inquiry probably would have led to knowledge, while the act of bankruptcy continued secret.

But, it is said, he may be just as ignorant of a commission having issued as of the act of bankruptcy, and so he may; and if nothing short of actual knowledge at the moment of payment be requisite, ignorance will be a protection, notwithstanding the words of the statute. And this brings us to the question, whether the commission be or be not in point of law, notice: that it is not so to be considered, rests on the part of the defendants, on general reasoning only; and we have been referred to no one case in which any such doctrine is to be found; while, on the part of the plaintiff, there is express authority the other way. In *The case of Bankrupts*, 2 Co. Rep. 26, *it was resolved by [*792] Wray, C. J., and the whole court, that a commission of bankruptcy is matter of record, of which every one may take notice; and without referring to the many cases in which the word "may" is to be construed "must," which will depend on the nature of the particular case, it is sufficient to say that, in this case, it appears that it must be so understood; for nothing turned upon actual knowledge as distinguished from notice by the commission, and the commission being taken to be notice, the judgment proceeded on this ground. The existence of the power to take notice, and the commission giving this power, is treated as equivalent to actual notice; and, if so, ignorance cannot be averred of that, which in point of law, a party is bound to know. It is true, this was a payment by the bankrupt after the commission, but the reasoning as to notice, applies in principle to one case as well as the other. This was resolved in 31 Eliz., and in 1 Jac. 1. the statute in question passed, that is, about fourteen years afterwards.

Supposing, therefore, this resolution in *The case of Bankrupts* to be law, it must be taken to have been known to be the law at the time when the statute of *James* passed, and it would be strange to suppose that, if the law were intended to have been altered in this respect, it should not have been so expressed; taking it, however, the other way, viz., that the statute meant only by "becoming bankrupt," the act of bankruptcy, then all is clear, and the statute is consistent with the law as it stood before, except as to giving protection to a debtor paying, being at the time of payment, ignorant of the act of bankruptcy. And this falls in with the general spirit and principles of the bankrupt law. The leading object is an equal distribution among the creditors. *Payments, [*793] therefore, made by the bankrupt, are set aside as fraudulent, if made in contemplation of bankruptcy, though the creditor be ignorant of such intention; but there is no protection to the bankrupt's estate, if the bankrupt may, notwithstanding the commission, go round and receive debts due to him before he

became bankrupt, and the parties paying, may aver ignorance of the commission, and put it upon the assignees to prove actual knowledge.

It is further to be considered, that, by the commission, all right and power is divested out of the bankrupt, he can make no disposition of his estate and effects; or, in other words, he may be considered as civilly dead, with respect to any power of disposing, in all transactions relative to his property before he became bankrupt. The commission and the assignment under it have relation to the act of bankruptcy, and avoid all intermediate transactions unless specially protected.

There is a further authority to which we have likewise been referred, viz., the case of *Hitchcock v. Sedgwick*, in which it was resolved in chancery by two of the commissioners against the third, that when the commission issues, all parties are bound to take notice. That case decides in substance, that every one is bound to take notice of a commission of bankrupt when taken out. On the words of the statute, therefore, on the sense and reason of the thing, and on the authorities cited; we are of opinion that the commission in this case was notice, and that actual knowledge and understanding, as distinguished from legal knowledge and understanding, was not necessary.

It remains to be considered, whether the subsequent statutes make any difference. It has been said, that it is monstrous that a party in cases of this sort is to be bound by constructive notice, or in other words, to be prejudiced *794] by a payment made in ignorance of a commission; and this has been strongly urged against assigning to the statute such a meaning. But to what do all the latter statutes go, but to make the commission notice? And, even if this had never been done before, it at least cuts up by the root all argument of injustice, unless the law itself is to be considered as unjust. By the stat. 46 G. 3, not only is a commission of bankrupt made notice of a prior act of bankruptcy, but even the striking of a docket is made notice; and though this latter provision is afterwards repealed, still the commission is re-enacted to be notice. I urge this at present, not only in answer to the imputed injustice of such a proceeding, relied on as an argument to prove that the legislature could never so intend; but, beyond this, to show that, to put such a construction on the statute of *James* is neither inconvenient nor unjust; but only to give to it the effect which the legislature in subsequent times has thought fit to recognise or introduce.

The stat. 19 G. 2, c. 32, protects only receipts from bankrupts; the stat. 46 G. 3, goes further, and applies to payments to, as well as by bankrupts; and provides, that the issuing of a commission or striking a docket, although such commission shall be superseded, shall be deemed notice of the prior act of bankruptcy. But, as it is made so for the purposes of the particular act, it may be argued, that it leaves the statute of *James* as it stood before. Of both, however, the object seems to have been, not to make a commission notice of the bankruptcy, as if it had not been notice before, but to make it notice, even though superseded, which otherwise it would not have been. But, with respect to this, it is not necessary to give an opinion; it is enough to say that, on the whole, we think that, on the true construction of the statute of 1 Jac. 1, the commission was notice, and that the latter statutes make no alteration in this *795] respect. The judgment, therefore, is, that the plaintiff do recover.

My brother *Richardson* having been counsel in this case, declines giving any opinion.

Judgment for the plaintiff.†

† See 4 B. & A. 523, this judgment reversed in error.

HIGGINBOTHAM v. PERKINS.

[3 Moore 185. S. C.]

By a section of a turnpike act, carriages laden with materials for repairing roads were exempted from toll in the parishes in which the materials were to be used, or were procured; and by the same section, carriages laden with manure or lime were also exempted. By the following section, the trustees under the act were empowered to compound with persons residing in one parish and occupying lands in an adjoining parish: Held, that the exemption in favor of carriages laden with manure or lime was general, and not confined or restricted by the preceding part of the section containing the exemption, or by the following section.

ASSUMPSIT on the common money counts. The action was brought to recover back the sum of 1s. 4d., paid to the defendant as farmer of the tolls, at a turnpike gate, called the *Misterton* gate in the parish of *Misterton*, in the county of *Leicester*. That sum had been demanded and paid as toll for a waggon laden with lime. At the last assizes for the county of *Leicester*, a verdict for the plaintiff was taken by consent, subject to the opinion of the court on the following case:

The defendant, at the time the toll was demanded and taken, was the farmer and collector of the tolls of *Misterton* turnpike gate, erected under the authority of stat. 5. G. 3, intitled, "An act for repairing and widening the road from the turnpike road in *Banbury*, in the county of *Oxford*, through *Daventree* and *Cottesbach*, to the south end of *Mill Field*, in the parish of *Lutterworth*, in the county of *Leicester*," and of statutes *25 & 47 G. 3, for amending and enlarging the terms and powers of the first-mentioned act. On the 9th of February the defendant demanded and received of the plaintiff the sum of 1s. 4d., as and for the toll authorised or claimed to be taken at the turnpike gate, in respect of the plaintiff's waggon drawn by four horses, which sum of 1s. 4d. was the proper toll to be demanded and taken for such waggon and horses, in case the plaintiff in respect thereof was not entitled to an exemption from toll. The waggon was laden with lime only, and, at the time of taking the toll, was employed only in carrying and conveying such lime from the parish of *Newbold* upon *Avon*, in the county of *Warwick*, to that of *Peatling Magna*, in the county of *Leicester*, to be there used in husbandry, for cultivating, manuring, and improving the land of the plaintiff, situate at the latter parish. The road in question over which the plaintiff's waggon passed, and for passing along which the toll was taken, was the proper and direct road from *Newbold* upon *Avon*, to *Peatling Magna*, and the waggon passed through the turnpike gate, in the necessary prosecution of its journey from the one place to the other; but both these parishes are at a distance from the turnpike road, and the road does not pass through any part of the parishes, or either of them.

The plaintiff claimed to be exempted from payment of the toll for his waggon and horses, by virtue of the statute 47 G. 3, c. 91, s. 4; by which it is enacted, "That no toll shall be demanded or taken for any horse, cattle, beast, or carriage, employed in carrying or conveying, or going to carry or convey, or returning from carrying or conveying, having been employed only in carrying or conveying on the same day, any stones, bricks, timber, wood, gravel, or other materials, for repairing the said road, or any of the highways or public *or private roads in any of the parishes, townships, or places in which any part of such road lies, or for the purpose of repairing any houses or other buildings, or to be laid or used in any of the yards, gardens, or homesteads, in any of the parishes or places in which such stones, bricks, timber, wood, gravel, or other materials shall be dug, brought, or procured; or hay, clover, turnips, straw, or corn in the straw only, not sold or disposed of, but passing to be laid up or placed in the outhouses, barns, or yards of the owners thereof; or for any horse, cattle, beast, or carriage employed only in carrying

or conveying, or going unladen or empty, to carry or convey, or returning unladen or empty from carrying or conveying, having been employed only in carrying or conveying any ploughs, harrows, or implements of husbandry, or any lime, mould, dung, compost, or manure, employed in husbandry, for manuring or improving lands, or any other thing to be used or employed upon, or for cultivating, manuring, improving, or managing land; or for any horses, beasts, or cattle going to or returning from pasture, or watering places, or going to or returning from being shod or farried; or from any person going to or returning from his or her parochial church, chapel, or other usual place of religious worship on a *Sunday*, or upon any other day on which divine service is or shall be ordered by authority to be celebrated, or attending the funeral of any person that shall die and be buried in any of the said parishes, hamlets, or places; or from any clergyman going to or returning from his parochial or ministerial duty, or visiting any sick person."

In the next clause (section 5), after reciting that it might happen that persons residing in some of the parishes, townships, or places through which the road lies, might rent or occupy lands in some other adjoining parish, township, or *798] place, and for the necessary occupation *of such farms might be obliged to have occasion to pass through some toll gate or toll gates erected or to be erected by virtue of the said act, between such place of residence and such farms respectively, and that it might be unreasonable that such occupiers of lands should be charged with the payment of the tolls raised or to be raised by virtue of certain acts therein recited, or that act, it is enacted, that it shall be lawful "for the trustees, or any five or more of them, at any public meeting, to compound and agree with all or any of such last-mentioned occupiers of lands, who shall request the same, for all or any of the tolls at such turnpike gates as aforesaid, at such annual sums or payments as the said trustees, or any five or more of them, shall think reasonable."

On the 6th of *February*, 1818, the plaintiff gave notice to the defendant and to the trustees of the road of such his claim of exemption; but the defendant, on the 9th of that month, insisted upon and received the said toll of 1s. 4d., which the plaintiff was compelled to pay, to prevent his waggon and horses from being distrained for such toll.

The question for the opinion of the court was whether the plaintiff was not entitled to exemption from toll, in respect of the said waggon and horses. If he was exempt, the verdict was to stand; but, if not, then it was to be entered for the defendant.

Copley, Serjt., for the plaintiff. Under the fourth section of this statute, carriages carrying manure are expressly exempted from toll; and although the former part of the same section, with respect to the carriage of materials for repairing the roads be restricted to the parishes in which the road lies, yet the restriction does not affect the latter part of the clause, under which the plaintiff *799] claims his exemption. Under the provisions of *the stat. 19 G. 3, c. 62, masters of vessels are empowered to carry lime for the improvement of land coastwise, without giving any bond for that purpose; which circumstance shows how anxious the legislature is to facilitate the conveyance of manure. It is highly improbable, therefore, that it could have been intended to confine the exemption from toll to carriages conveying lime to those parishes in which the road lies.

Vaughan, Serjt., for the defendant. It is clear, that, under the general provisions of this act, the plaintiff is liable; it is, therefore, necessary, that he should bring himself within the terms of the exemption contained in the fourth section, to remove that liability. But this he cannot do, for although the words "parishes, townships, or places," are not repeated in the latter part of the section, relative to the carriage of manure, still those words override the whole section. The first exemption applies to the carrying of materials for repairing the roads, and is confined to the parishes in which the roads lie. The second exemption

applies, also, to the carrying of such materials, and is also expressly confined to the parishes in which the materials are procured. The third exemption applies to hay, corn, &c., to be placed in the barns of the owners. In this exemption, the words "parishes, townships, or places" are not used; but it is clear, that this exemption cannot be general; it was merely intended to apply to the owners resident in the parishes where the toll gate was erected: it could not be intended to extend to all parishes, so as to apply to corn going to granaries to be laid up at any distance, however great. In the same manner the exemption must be construed as to carriages laden with manure or lime; it must be restricted in the same manner as the previous part of the section is restricted. Besides, how could the toll keeper ascertain to what distance the carriage may be proceeding? The subsequent words of the same section, "any person going to or returning from his or her parochial church," show, also, that they refer to the antecedent sentences. This exemption must be necessarily confined, and cannot be held to apply to places out of the parishes. *Lewis v. Hammond*, 2 B. & A. 206, is precisely applicable to this case. It was there held, upon the construction of a turnpike act, 37 G. 3, which exempted from toll "persons residing in any township or parish in which the roads lay, in going to and returning from their proper parochial church, chapel, or other place of religious worship on Sundays," that the word "parochial" extended over the whole clause; and, therefore, that a dissenter was not within the exemption, in going to and returning from his proper place of religious worship, situate out of the parish in which he resided. *Abbott, C. J.*, there said, that "the exception did not extend generally to all persons going to or returning from a place of religious worship, nor even to all persons going to or returning from their proper place of religious worship." And, subsequently, "the word parochial is to be applied in construction, not to the word church only, but also to the following words chapel or other place of religious worship, as denoting the situation of such chapel or other place, with reference to the residence of the persons frequenting it. This construction is also aided by the consideration of convenience. The gate-keeper may be expected to inform himself as to the persons residing in his parish, the places of worship situate within it, and the hours of usual attendance at them, but he cannot be expected to acquire such information as to other and more distant places." So, in the present case, the gate-keeper may reasonably be expected to know the persons in the parishes where the gate is situate, but not persons residing at a distance.

*If the exemption be considered general, the fifth section of the act is nugatory: it is not possible to put any construction upon it, so as to give it effect. It would be idle to call upon a party to compound for that from which he is exempted. The terms of the act imply a limitation of the exemption, and the intention of the legislature will be defeated if judgment be given against the defendant.

Copley, in reply, observed, that the fourth section was not affected by the subsequent section, as the trustees were authorised to compound with those persons only who were exempted by the fourth section; and that *Lewis v. Hammond* was distinguishable from the present case, as there the question was upon one clause only, in which the word "parochial" being used, it was held to extend over the whole clause.

Cur. adv. vult.

DALLAS, C. J., now delivered judgment.

This is a question on the construction of the statute 47 G. 3. c. 91, which was an act passed for enlarging the terms and powers of two acts of the 5th and 25th years of his present majesty, for repairing the road from *Banbury*, in the county of *Oxford*, to *Lutterworth*, in the county of *Leicester*, and the only point left for the consideration of the court, is the construction of the fourth and fifth sections of that statute. The fourth section is general, as far as it exempts

from toll any carriage employed in carrying lime or manure, for the improving, manuring, or managing land; it is, therefore, an exemption in favor of agriculture, and to be beneficially construed. It contains no reference to persons residing within or out of the parishes through which the road runs; or to lands being situate within or out of such parishes; and this being the case of a wagon carrying lime, for the *improvement and management of land, the owner would be clearly exempted under this clause, unless, as to him, it were restrained by any clause which follows. Section the fifth is relied on by the defendant, which, it is said, by necessary intendment, does so restrain and limit the former section.

It is first to be observed, that, in this case, the plaintiff's waggon was passing along the road from one parish to another, with a view to the cultivation of his farm, situated at the latter parish, neither of the parishes being a parish through which the road passes. Upon the fifth clause it is asked, if persons residing within some of the parishes through which the road lies, are taken to be liable to toll passing along the road and through the toll gate, for the necessary occupation of lands out of the parish, and have leave given them to compound, how can it be, that persons not living in any of the parishes, shall, for the occupation of farms not within them, be exempted from toll?

The answer is, that the first clause being general, and to be literally construed, can only be restrained by express words or necessary implication. Express words there are none, nor is such a restraint of necessity to be implied; for there are still tolls to which a resident within the parish would be liable, going through the toll gate, for the occupation of his farm, which do not fall within the general clause of exemption; and, therefore, when the statute treats him as being liable, it must be taken in respect of such tolls; and the power to compound for all or any, must mean all or any which were payable generally, and not those from which all persons were exempted before.

These acts are often inaccurately drawn; and, even, taking the construction of the clause to be doubtful, a doubtful meaning is not a sufficient ground to *803] restrain the operation of a general clause, which in its own terms is clear and precise; and least of all, should such a restraint prevail, when it is to narrow and repeal a provision, which for the public benefit ought to be largely and beneficially construed.

Judgment for the plaintiff.



MEMORANDA.

In the course of this term, *Vitruvius Lawes*, of the *Inner Temple*, Esquire, *John Cross*, of *Lincoln's Inn*, Esquire, and *Thomas D'Oyly*, of the *Middle Temple*, Esquire, were severally called to the degree of Serjeant at law; they gave rings with the motto "*Pro Rege et Lege*."

END OF HILARY TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
MICHAELMAS TERM,
IN THE
FIFTY-FIRST YEAR OF THE REIGN OF GEORGE III, 1810.

(IN THE EXCHEQUER CHAMBER.)

(In Error.)

TAYLOR v. PILL.†

[11 East 414. S. C. in B. R.]

1. *A.*, when a prize was taken by a revenue cutter, bore the commission of mate, but was acting commander on board under an order from the commissioners of customs, communicated by letter to the comptroller and collector of the port to which the cutter belonged, and by them communicated by letter to *A.*, directing him to take care that the cutter should be kept at sea *under his command*, to the end that the service might not suffer, *until another commander should be appointed*: Held, that he was entitled to the commander's share under the king's warrant, referring to a former warrant, which described the share as to be distributed amongst the commanders, officers, and crew of the vessel making the capture, as a *reward for that service*; although the former commander, whose commission as such, had been before withdrawn and cancelled on some supposed misconduct, and who had consequently left the cutter, was afterwards restored, and a new commission granted to him, bearing the date of his former commission, viz. a date anterior to the capture.

† This and the three following cases were omitted in their proper places.

2. Held, that *A.* was not entitled to the full share of commander without deducting the share of a *deputed mariner*, who was on board at the time of the capture, but who, at the time of *A.*'s beginning to act as commander, acted as mate, and was acting as such, and not as a *deputed mariner*, at the time of capture, but without any commission or authority to act as mate.

ASSUMPSIT for money had and received. The defendant below (plaintiff in error) pleaded the general issue, except as to 2024*l.* 6*s.* 3*d.*, and as to *that sum, a tender. The plaintiff below (defendant in error) joined issue, on the first plea, and admitted the tender. A special verdict was found, of which the following is the substance: *T. M. Allan*, on the 26th of *March*, 1803, was the commander of the *Hinde* cutter, then employed in the service of the commissioners of the customs, by virtue of a commission, signed by four of them, dated 20th of *October*, 1801. On the 26th of *March*, 1803, the commissioners wrote a letter, dated at the custom-house, *London*, to the comptroller and collector of the customs at *Falmouth*, which, after noticing certain charges which had been preferred against *Allan*, commander of the *Hinde* cutter for inactivity, inattention, and violation of his instructions, with regard to the victualling of the crew, proceeded as follows: "having read his (*Allan's*) answer, the evidence of the several persons examined, and your observations thereupon; and it appearing that he is guilty of the charges, and, consequently, an unfit person to be any longer employed in the service of this revenue; we have dismissed him therefrom; and direct you to call in his commission and instructions, and transmit the same hither cancelled, with your next accounts, by the carrier; and we enjoin you to take care that the cutter be kept at sea, and in constant motion, under the command of the mate, to the end that the service may not suffer, until another commander shall be appointed; and you are to pay the said mate the usual allowance for victualling during the time he shall act as commander, with an injunction, at his peril, to render a just and true account of the number of mariners he shall really and truly victual, and also a list, containing the names of those he shall not victual, distinguishing the particular times in each respective case, so that the crown may not be defrauded." In obedience to this order, the said comptroller and collector called in *Allan's* commission as such *807] commander; and it was delivered up and cancelled *on the 29th of *March*, 1803, and transmitted to the commissioners in *London*, and on the next day *Allan* left the cutter, went on shore, and did not return again on board until a new commission, hereinafter mentioned, was granted to him. Before and at the time of *Allan's* dismissal, and of the cancelling of his commission, *Pill*, the plaintiff below, was a *deputed mariner*, of and belonging to the *Hinde* cutter, but acting as mate, and serving on board in that capacity; and on the 29th of *March*, he received the following order, signed by the comptroller and collector of the customs at *Falmouth*.

"Sir,

"The honorable the commissioners of his majesty's customs having thought proper to dismiss Mr. *Thomas Murray Allan*, from the command of the *Hinde* cutter, in the service of the revenue, we hereby direct and enjoin you to take care that the said cutter be kept at sea and in constant motion under your command, to the end that the service may not suffer, until another commander shall be appointed; and we have the board's directions to pay you the usual allowance for victualling during the time you may act as commander; but you are to take especial care, the failure of which you will have to answer at your peril, to render a just and true account of the number of mariners really and truly victualled, and also a list containing the names of those not victualled, distinguishing the particular times in each respective case, so that the crown may not be defrauded,

"We are, &c.

"To Mr. *Philip Pill*, acting mate of the *Hinde* cutter."

On the 2d of *April* following, four of the commissioners of customs, by a commission under their hands and seals, appointed *Pill* to be mate of the cutter, and on the 5th of the same month, the following letter was dated at the custom-house, *London*, signed by four of the commissioners, and directed to the collector and comptroller of the customs at *Falmouth*. [*808]

" Gentlemen,

" Having had occasion to refer to your report of the 17th *ultimo*, and it not appearing thereby that Captain *Allan*, was present at the charge, as required by the third article of the printed orders, we direct you forthwith to report as to that fact; and in case he was not, you are to account for not having strictly complied with the said rules, and to charge him *de novo*, and in the mean time to suspend all proceedings as to his dismissal."

Captain *Allan*, not having been present at the hearing of the charges referred to and decided upon by the order of the 26th of *March*, although he had previous notice for that purpose from the collector and comptroller, and the commissioners of the customs having investigated the matter again, on the 16th of *June*, 1803, transmitted their order thereon, in a letter of that date, to the same officers at *Falmouth*, wherein, after stating that having considered the former charges and the renewed charge against Mr. *Allan*, the present commander of the *Hinde* cutter, and read his answers thereto, and the evidence of the persons examined, they deemed his answer to the first charge satisfactory; and that he was guilty of the second charge; but that, under all the circumstances of the case, and considering that the revenue had not been injured by the mode adopted by Captain *Allan*, though highly irregular and improper, for reimbursing himself the loss sustained in victualling his crew, for which it appeared that he had the example of his predecessors, and that he had shown himself a meritorious officer for fifteen years, they directed the *Falmouth* officers to enjoin him to be particularly circumspect in his conduct in future; and concluded thus: [*809]

" We therefore hereby rescind our order of the 26th of *March* last, for his dismission, and direct you to deliver to him his commission and instructions, in order that he may return to his duty." The commissioners having before received the cancelled commission, made out a new commission for Captain *Allan*, of the same date as his former commission, and transmitted the same to the *Falmouth* officers, in a letter, on the 23d of *June*, 1803, with directions to deliver the same to Captain *Allan*. In consequence of the before-mentioned order of the 29th of *March*, 1803, the plaintiff below immediately took upon himself the command of the *Hinde* cutter, and continued in the exercise of such command from that time to the 29th of *June* following, when the new commission was delivered to *Allan*, as commander of the cutter, and who thereupon resumed the command of her.

Between the 29th of *March*, 1803, and the granting of the new commission to *Allan*, and whilst *Pill* had the command of the cutter, and was on board of the same, namely, in *May*, 1803, the cutter captured certain vessels from the enemy. On the 18th of *March*, 1803, the commander in chief of the king's ships at *Plymouth*, sent an order to *Allan*, as commander of the cutter, to receive on board her, a lieutenant, four petty officers, and six seamen, with a month's provisions, and proceed therewith to the western ports in the neighborhood, for the purpose of impressing men. On the 26th of *March*, 1803, before making the captures, lieutenant *Senhouse*, with the petty officers and seamen, were sent on board the cutter, with directions to make reprisals on the *French*, and to detain *Dutch* vessels, as stated in his majesty's warrant after mentioned, and continued on board on such service till after making the captures; but *Allan*, was not on board the cutter at the time of making the captures, nor at any time after he left the cutter, until he resumed the command as aforesaid; nor did any person act as commander on board at the time of making the [*810]

captures except *Pill*, who, from the time of his receipt of the order of the 29th of March, 1803, until *Allan*, was so restored to and resumed the command, had the command of and acted as commander of the said cutter, and the officers and crew thereof, and from time to time victualled the same; and he was afterwards paid the usual pay as mate, and the usual allowance in respect of victualling as commander. The defendant below, as prize agent to the cutters employed in the custom-house service, on the 9th of November, 1804, presented a memorial to the treasury, in which he described *Allan* as commander of the *Hinde* cutter; and stated the fact of the captures on the 28th of May, 1803, under the order stated; the condemnation in the Court of Admiralty; and the application for the prize money, amounting to 361*l.*, to be paid to the memorialist for the use of the officers and crew of the said cutter, though she had not a letter of marque at the time. This was followed by other memorials to the like purport from the prize agent, and by others from the admiral on the station, and on behalf of Lieutenant *Senhouse*; and on the 26th of November, 1805, the king granted his warrant for the distribution of the prizes, in which it is stated, that whereas Lieutenant *Senhouse*, of the ship *Conqueror*, was, on the 26th of May, 1803, appointed by the port admiral at Plymouth to the *Hinde* revenue cutter, with orders to make reprisals on the French, and to detain Dutch vessels, agreeably to the instructions he should receive from his captain (*Louis*); that captain *Louis* accordingly gave Lieutenant *Senhouse* further orders, and that the said revenue cutter, *Hinde*, under the command of Lieutenant *Senhouse*, during the time she was in the service of the *Conqueror* *811] as aforesaid, seized and detained certain French and Dutch vessels which had been condemned as prize, and that the proceeds were in the Admiralty Court. His majesty then proceeded to direct one-eighth of the moiety of the proceeds to the port admiral; three-eighths to the captain, officers, and crew of the *Conqueror*, including Lieutenant *Senhouse*, and the officers and men put on board the *Hinde* revenue cutter from the *Conqueror*; and the remaining four-eighths to the commander, officers, and crew of the said *Hinde* revenue cutter, or to *R. Taylor*, (the defendant below) general prize agent for all captures made by custom-house cutters; to be distributed amongst them, conformably to the proclamation for the distribution of prizes, and according to the sanctions and penalties of the existing prize act, and the proportion thereby granted to the commander, officers, and crew of the revenue cutter *Hinde*, to be distributed amongst them, conformably to his majesty's warrant, dated 4th of July, 1805, directing the distribution of the proceeds of prizes taken by custom-house vessels.

By the king's warrant lastly referred to, the prize money is distributed into thirty-two parts, of which fourteen parts are given to the commander, seven to the mate, three to deputed mariner or mariners, if any, exclusive of their shares as mariners, and eight to other mariners; or if there be no deputed mariners, one-half to the commander, one-fourth to the mate, and one-fourth to the mariners. And it is therein stated to have been recommended to his majesty, that these or some portions of prizes made by custom-house vessels should be distributed amongst the commanders, officers, and crew of the vessel making such capture, as a reward for that service.

No memorial was presented to the king or to the treasury by *Pill*, except as aforesaid; nor was it known to his majesty before or at the time of making *812] his warrant or order of the 26th of November, 1805, that *Allan* was not on board the *Hinde* cutter, or in the actual command thereof at the time of making the captures, or that *Pill* at that time had the command or acted as commander of the said cutter.

On the 10th of December, 1801, *J. John* received a custom-house commission, appointing him to be a deputed mariner on board the *Hinde*, by virtue of which he was acting as deputed mariner when *Pill* was appointed to the command of the cutter; but, on such appointment of *Pill*, and during the time that *Pill*

acted in such command, he ceased to act as mate of the cutter; and *John*, during all that time, acted as mate in the place of *Pill*, and not as deputed mariner; nor did any person act as deputed mariner during that time.

The captured vessels were duly condemned as prizes, and one-fourth of the proceeds was paid to *Taylor* as the general prize agent for custom-house captures, amounting to 9253*l.* 18*s.* 6*d.* *Pill's* share, if entitled to share as commander, without deduction of a deputed mariners's share, was 4626*l.* 19*s.* 3*d.*; or, if subject to such deduction, 4048*l.* 12*s.* 6*d.*, but, if *Pill* were only entitled to share as mate, then 2024*l.* 6*s.* 3*d.*; which latter sum was tendered to him by the defendant below before the action brought, and a tender thereof being pleaded, the plaintiff below took that sum out of court, and the remainder of the sum claimed continued in the hands of the defendant below.

In *Trinity* term, 1809,† the Court of King's Bench gave judgment that *Pill* was entitled to recover the sum of 2602*l.* 13*s.*, being the balance of his share of the prize money, in which the court was of opinion that he was entitled to share as commander of the cutter, without being subject to any deduction on account of a deputed mariner's share.

*Whereupon *Taylor*, the defendant below, brought a writ of error [*813 in this court, assigning for error that the plaintiff below never had any commission to be, nor ever was the legal commander of the ship or vessel called the *Hinde* cutter therein mentioned, and therefore could not be, nor was legally entitled to the commander's share of the prize money in the special verdict mentioned, and the common errors. The plaintiff below joined.

The case was argued in *Michaelmas* term, 1810, by *Richardson* for the plaintiff in error, and by *Laues* V. for the defendant in error.

Richardson for the plaintiff in error. The judgment of the court below ought, it is submitted, to be reversed. It will not be sufficient for the defendant in error to show that he is entitled to share as commander, for unless he goes farther, and shows that there was no deputed mariner on board, though the defendant in error be entitled to share as commander, he will be entitled to a less sum than the judgment of the court below has given him.

The first question resolves itself into the point, whether the commander mentioned in his majesty's warrants means a commander appointed by commission, or the person who, at the time of taking the prizes, acted as commander? And it is submitted, that by the term commander, is meant a commissioned officer—a commander deriving his authority under a commission, and not a commander in the ambiguous or loose sense as denoting the person who does in fact exercise the command.

And here it is to be observed, that the question is not, whether *Allan* or *Pill* may have the best right to the prize money, but whether *Pill*, whose claim rests solely on the king's bounty, can bring such claim within the [*814 *king's intention as expressed in the warrant. If he fails in so doing, his share will be undivided by the warrant, and subject to the king's pleasure. It is submitted with deference, that this important feature in the case was not so much attended to as it deserved to be in the judgment pronounced by the court below.

But, supposing the court should be satisfied that the defendant in error is entitled, the judgment below cannot stand, unless the court shall be of opinion that there was no deputed mariner on board. There is no pretence for saying that there was no deputed mariner on board, and so the defendant in error cannot be entitled to the whole amount given by the judgment of the court below, because that judgment supposes that there was no deputed mariner on board.

Upon the first question, without going through all the cases on the construction of the prize acts, in arguing a case which must depend mainly on its own circumstances, it will be sufficient to advert to the cases stated on the former argument, and the purpose for which they were cited. It was argued below

† See 11 *East*, 414.

that the distribution of prize money is intended by his majesty to be a reward for actual service; and some stress was laid upon the fact that his majesty in his general proclamation, recites that it has been recommended to him by the lords' commissioners to make such grants as a reward for actual services. No doubt the prize money is granted to those who are concerned in taking prizes; but this does not carry the argument further, for it still stops at the question, whether his majesty intended that the person should share as commander who was in the actual exercise of that superior command without an actual commission.

The cases of *Johnstone v. Margetson*, 1 H. Bl. 261, *Taylor v. Lord, H. Pawlett*, *ibid.* 264, n., and *Pigot v. White*, *ibid.* 265, n., *Lumley v. *815* **Sutton*, 8 T. R. 224, *Wemyss v. Linzee*, Doug. 324, and *Lord Viscount Nelson v. Tucker*, 4 East, 238, turn principally on the construction to be put on terms contained in the king's proclamation, and it may be conceded that courts will always be desirous so to construe the proclamation as to give the prize money as a reward for actual services done; but the person seeking such reward must bring himself within the capacity of serving in the situation to which the reward is allotted; it will not be sufficient merely that the service is done.

The case of *Lumley v. Johnstone*, which gave rise to that of *Sutton v. Johnstone*, 1 T. R. 493, so far as it is an authority at all, is an authority for the plaintiff in error. [*Mansfield, C. J.* The case of *Wemyss v. Linzee*, shows that a captain of marines, who happens to be on board a man of war when she takes a prize, but who does not belong to her complement, shares not as a captain, but only as a passenger.] The defendant in error was not the commissioned commander of the *Hinde* when she took the prize. The difficulty arises from the ambiguity of the term "commander," which in a popular sense may mean every person who exercises command: to the terms "captain," or "admiral," no such ambiguity is attached. [*Macdonald, C. B.* "Commander making such capture."] The party to be rewarded must certainly make the capture; but it does not, therefore, follow that the person who performs the functions of commander, is therefore, entitled to share as commander according to the intent of the king's warrant. Suppose it should happen that the mate of a ship should become commander, somebody, probably some senior seaman, would act as mate, but neither of those persons in such case would *816] share as commander or mate, even if the *situation of the mate was filled by a deputed mariner. [*Heath, J.* It may happen very often by the death of a commander or captain, that the first lieutenant is to command the vessel. Will he under such circumstances, share as captain, or only as first lieutenant? *Macdonald, C. B.* He only takes a lieutenant's share.] A captain never can be a captain within the meaning of the prize act, without a commission, and there is no reason for extending the meaning of that act to an uncommissioned commander. [*Graham, B.* Suppose *Allan* never to have been restored. Would the defendant in error never have taken his share as commander?] It is an important fact that, at the time when *Allan* was first dismissed from the *Hinde* on the 28th of *March*, there was no mate belonging to that cutter but the defendant in error, and he at that time held the commission of a deputed mariner, but acted as mate. On the 26th of *March* the commissioners had dismissed *Allan*; and they ordered that the cutter should be kept at sea under the command of the mate, to the end that the service might not suffer until another commander should be appointed. On the 2d of *April* they proceed to make out a new commission for the defendant in error, who was then a deputed mariner. If they had intended to make him commander, they had an opportunity of doing so; but they appoint him by commission, not to be commander, but mate.

Another argument arises from the warrant, and the memorial of the plaintiff in error. It appears from the warrant, that the cutter was under the command

of lieutenant *Senhouse* when the prizes were taken, and yet it supposes that there was a proper legal commander belonging to her. This shows that the act of making the prizes was not regarded by his majesty so as to govern him in the distribution of the prize-money; for though lieutenant *Senhouse* performed the functions *of a commander, yet as he was only a lieutenant belonging to another ship, he had no more than the share of a lieutenant. [*817] *Graham, B.* The cutter was to be kept at sea under the command of the defendant in error till another commander should be appointed, to the end that the public service might not in the mean time suffer. In the mean time then, the defendant in error is to act as commander; and I think that the warrant considered him as commander, in which capacity he was acting.] The special verdict states that he was acting as commander; but it is contended that he was not commander within the intent and meaning of the king's proclamation, but that the meaning of the term "commander," as used therein, is a commissioned commander; because his majesty knew, and the warrant actually recites that Lieutenant *Senhouse* had the real command of the cutter, and yet he proceeds to give one-fourth to the commander, officers, and crew.

As to the second point, there was a deputed mariner on board at the time of the captures. For, though the warrant considers it as doubtful whether there might be found on board at the time of making a capture, a deputed mariner, the special verdict, which states *John's* appointment as such under commission, is conclusive on this head. By virtue of this commission he was acting as deputed mariner when the defendant in error received the directions of the commissioners with regard to the cutter, and he was on board when the captures were made. Now, granting that the directions of the commissioners were in effect a virtual commission to the defendant in error to raise him from his situation as mate, there is no authority or order in the case of *John* to vary his situation. And it is with deference submitted that this is an inconclusive part of the judgment of the court below. There is no virtual commission or order to make *John* mate. It is true, that while the defendant *in error acted as commander, *John* acted as mate; but because *John* chose to act as [*818] mate, that will not destroy his commission as deputed mariner and make him mate. [*Wood, B.* It is found by the special verdict that, on the appointment of the defendant in error to the command, and during the time that he acted in such command, he ceased to act as mate of the cutter, and *John*, during all that time, acted as mate in the place of the defendant in error, and not as deputed mariner, nor did any person act as deputed mariner during that time.] *Lumley v. Sutton* bears on this part of the case. There the court went on the words, showing that the captain was actually on board. Captain *Sutton* had been appointed by the Lords of the Admiralty captain of his majesty's ship *Isis*. It was deemed sufficient to entitle him to his share of prize-money that he was on board, and in possession of his commission at the time the prize was taken, though he did not act. In the present case *John*, though he acted as mate, was on board with the commission of a deputed mariner, he is, therefore, only entitled to share as deputed mariner. [*Heath, J.* If the defendant in error is entitled to share as commander, there is no person who can better himself, and come under the description of mate, to share as mate, if *John* is not permitted to vary his situation of deputed mariner, and to act and share as mate.] That, it is submitted, *John* cannot do by his own authority, and, therefore, the plaintiff in error is entitled to judgment.

Lawes, V., for the defendant in error. The cases alluded to, were cited to establish the position that, in the distribution of prize-money on the construction of the prize acts, the court had always looked to the persons who had really performed the service.

*The case of *Lumley v. Sutton* will be found to turn on a point [*819] which does not arise here. The rights of Captain *Sutton* were in that case held not to be affected, because he was in a state of illegal suspension,

He was under duress on board his ship at the time of the capture. He was ready to do all he could, but, by his superior in command, his actual service was at the moment suspended, and Captain *Lumley* actually did the service. Captain *Sutton's* commission still existed, and he was on board the ship at the time of capture; but, in this case, *Allan's* commission was cancelled, and he had been dismissed the service for misconduct.

The case of *Wemyss v. Linzee* turned on the distinction that Captain *Wemyss* did not appear to form a part of the ship's complement; and, therefore, though a captain of marines, he only shared as a passenger. On the second trial, it did not appear that he had acted as commanding the marines on board. This case widely differs from the present. The defendant in error performed the service in fact.

On the first point it is submitted, that the defendant in error was a commander within the intention of the warrant. To suppose that to bring him within such intention, it is necessary that he should be a commander acting by commission, is to beg the question. The case of *Lord Nelson v. Tucker* shows, by analogy, that such is not the necessary construction. The warrant looks to any commander, officers, and crew, who have had the merit of successfully performing the service. There is no such term as a commissioned commander in the warrant. And if no such epithet be found, then the court will not supply it to the prejudice of the party who has undergone all the fatigue and danger of actually making the capture. The object of the warrant was to give a reward *820] for service done. The service was done, and quite as successfully *as it could have been done if a formal commission had been in the pocket of the defendant in error.

With regard to the argument supposed to arise from the memorial, where the name of the defendant in error does not occur, the broad answer is, that the king only looks to the service performed. Whoever turns out to be the person who has done the service is the person meant. If, however, there be any thing irregular in the memorial, the plaintiff in error, who framed it, and not the defendant in error, must answer for the irregularity. [*Manfield*, C. J. The memorial cannot be of any effect. *Lawrence*, J. And the warrant does not at all refer to it.]

With regard to the argument, that Lieutenant *Senhouse* had the actual command of the cutter—[*Manfield*, C. J. That is particularly provided for. The lieutenant and his officers and men were put on board, and the warrant particularly provides for them. It is particularly ordered what was to go to Lieutenant *Senhouse* and his men, part of the *Conqueror's* crew. It is then ordered, that one-fourth should be distributed to the commander, officers, and crew: and the warrant is so worded as necessarily to show, that it supposed a commander besides Lieutenant *Senhouse*.] That commander was the defendant in error, who, though without a formal warrant under the hands and seals of the commissioners, was as much empowered to act as commander under the form of authority which the commissioners sent to him, as if he had been formally appointed to that office under their hands and seals. There is no law that, when the commissioners appoint a commander to a revenue cutter, the appointment must necessarily be under their hands and seals. The defendant in error would have been responsible for any delinquency. The subsequent mate's commission was never acted on, and was, therefore, nugatory.

*821] With regard to the second point, it is submitted that there was no deputed mariner on board at the time of the capture. The defendant in error was raised from the office of mate to be commander, and *John* immediately stepped into his situation of acting mate. When the defendant in error ceased to act as mate, all the duties of that office necessarily devolved upon *John*: he did in fact perform them: he must, therefore, be considered as mate, and, from the moment of devolution, was no longer a deputed mariner.

Upon these grounds, it is submitted that the judgment below must be affirmed.

Richardson, in reply. It appears to have been the intention of the king to grant the whole of the moiety. The court, therefore, will have to construe the grant, and to decide whether it will pass by the words used. Various examples are cited in *Comyns's Digest*,† to show that the grants of the king shall be utterly void, if he misconceives the nature of the grant or be deceived. If an individual, seised of an estate for life, grants in fee, an estate for life will pass; *aliter* in such a grant by the crown; for in such case nothing would pass.

It was thrown out, that the memorial could not be taken into consideration: but it is submitted that it is very material in considering whether the king has acted under misapprehension. Now it is not only stated by the memorial that *Allan* was the commander, but it is found in the special verdict that his majesty did not know that *Allan* was not present during the capture. His majesty, therefore, could only have proceeded on the ground of error, and so the grant would be void. It is plain, that it was taken for granted that there was a legal commander on board.

The argument founded on devolution, and endeavored *to be supported by the case of *Lord Viscount Nelson v. Tucker*, is fallacious. [*Mansfield*, C. J. That devolution was in consequence of the commission granted to the second admiral, his superior being gone; in consequence of that commission, the authority devolved on the second.] If all the admirals are removed, the senior captain becomes commander by devolution; but a first lieutenant, on the death of his captain, does not become captain, so as to be entitled to a captain's share, nor does the senior captain become admiral, so as to be entitled to the admiral's share. [*Mansfield*, C. J. A man cannot be an admiral, in any sense of the word, but by commission.] Lord *Nelson* was the second in command, and, on the first in command retiring, he succeeded by devolution. The case has not the smallest relation to that before the court.

It is said that the commissioners made the defendant in error commander by what they did as effectually as if they had constituted him commander by commission. There appears a strange repugnancy in their acts, if such were the fact; for they order that the vessel should be kept at sea under the command of the mate until another commander should be appointed. That seems to show that they did not consider the defendant in error as commander. [*Mansfield*, C. J. It is something very like saying that he shall be commander, to say that the vessel should be under his command until another was appointed. *Graham*, B. It is a very nice distinction to take, to say that he acted as commander, but was not commander.] The commissioners never say that he was to have the pay of commander, and he was not to have the pay of commander. [*Graham*, B. It was provided by the proclamation, that Lieutenant *Senhouse* was, in the distribution of prize, to be accounted only a lieutenant.] That appears to give rise to an argument in disfavor of the defendant in error; for his majesty well knew that Lieutenant *Senhouse*, whom he names, *had performed the service, and yet he considers another as commander, never naming the defendant in error, but plainly looking to a commander who acted under commission. [823]

Upon these grounds it is submitted, that the judgment of the court below must be reversed; but even if the court be of opinion that the defendant in error was entitled to share as the commander, the judgment must still be reversed to a certain extent, unless the court be of opinion that *John* was not a deputed mariner, but that he both acted as mate, and filled that office.

The court was then cleared, and on the re-admission of counsel, *Mansfield*, C. J., asked for the form of the instrument of appointment of *John*, as it might

† Tit. *Grant*, G 8. G 9.

be fit to be considered in deciding the second question. It was accordingly furnished.†

Cur. adv. vult.

*824] *And, afterwards, in this same term the following judgment was delivered.

MANSFIELD, C. J. In this cause of *Taylor* and *Pill*, a writ of error has been brought before this court, to reverse a judgment of the Court of King's Bench, the substance of which judgment is to give to the defendant in error, *Pill*, a certain share of the produce of prizes taken by a vessel in the service of the revenue, called the *Hinde* cutter.

The questions that arise upon the special verdict are, in their nature, very short; and one of them seems to be tolerably plain.

It is not necessary to go through a particular statement of the case, for that is extremely well understood; but, in substance, it is, that this person of the name of *Pill* was in the situation of acting mate of this *Hinde* cutter; and the person who had the command of this cutter, of the name of *Allan*, was dismissed from that situation; and, he being dismissed from that situation, that the service might not suffer, there was a direction by the commissioners of the customs to the revenue officers at *Falmouth*, to the effect that they should

*825] immediately *appoint a commander to this vessel. The words are, "We hereby direct and enjoin you to take care that the said cutter be kept at sea and in constant motion, under the command of the mate, to the end that the service may not suffer, until another commander shall be appointed;"—and they were to pay this mate the usual allowances. Then the officers at *Falmouth*, addressing themselves to *Pill*, who at that time only acted as mate, appoint him in these words, "We hereby direct and enjoin you to take care that the said cutter be kept at sea and in constant motion, under your command, to the end that the service may not suffer, until another commander shall be appointed." Under this appointment *Pill* took the command, being then only acting mate, which he had been some time, but in two or three days after, he was appointed mate. This appointment of him as commander was on the

† Form of the warrant:

"To all people to whom these present shall come.

We, the commissioners for managing and causing to be levied and collected his majesty's customs, do hereby constitute and appoint A. B. to be a mariner on board the *Hinde* cutter, in the service of the said revenue in the port of *Falmouth*, and to do and perform all things to the said office or employment belonging, by virtue whereof he hath power to enter into any ship, bottom, boat, or other vessel, and also in the day-time with a writ of assistants under the seal of his majesty's Court of Exchequer, and taking with him a constable, headborough, or other public officer next inhabiting, to enter into any house, shop, cellar, warehouse or other place whatsoever, not only within the said port, but also within any other port or place whatsoever, there to make diligent search, and in case of resistance, to break open any door, trunk, chest, case, pack, truss, or any other parcel or package whatsoever, for any goods, wares, or merchandises prohibited to be exported out of, or imported into, the said port, or whereof the customs or other duties have not been duly paid, and the same to seize to his majesty's use, and to put and secure the same in the warehouse in the port next to the place of seizure. In all which premises he is to proceed in such manner as the law directs, hereby praying and requiring all and every his majesty's officers and ministers, and all others whom it may concern, to be aiding and assisting to him in all things as becometh. Given under our hands and seal, at the custom-house, *London*, this day of , in the year of the reign of our sovereign lord king *George* the , and in the year of our Lord

C. D.
E. F.

G. H.
I. K.

N. B. By the act of 24 G. 3, c. 47, s. 32, officers making collusive seizures, or directly or indirectly taking or receiving any bribe, recompense, or reward for the neglect or non-performance of their duty, shall forfeit the sum of 500*l*.

And if any person shall give, offer, or promise to give any bribe, recompense, or reward to, or make any collusive agreement with any officer of the customs, or connive at any act, whereby the provisions of this or any other act relative to the customs may be evaded or broken, every such person shall forfeit the sum of 500*l*."

29th of *March*, and, upon the 2d of *April*, he was regularly commissioned as mate. Afterwards, the suspension of *Allan* was revoked, and he was restored to the command; but, before *Allan* was restored to the command, and while *Pill* had the actual command of this vessel under the appointment, such as I have stated, prizes were taken by her.

No claim is made, and it is agreed, no claim can be made, to any part of the produce of the prizes by *Allan*, because he was suspended from the office of commander at the time when the prizes were taken, and he was not on board at the time of their being taken. This claim is made by *Pill*, as being the actual commander at the time when the prizes were taken, under the warrant of his majesty for the distribution of these prizes. Now the terms of that warrant, as well as the nature of the thing, show that the distribution of prize-money among the officers and crew of a ship is intended as a reward for the services they have performed, and that it is intended *also as an incentive to others in similar situations to act with zeal, and courage, and [*826 activity, in the public service; and his majesty's warrant recites a representation from the lords of the treasury to his majesty, that it would be of use and encouragement to the service to have the prizes taken by these revenue cutters distributed among the crew, and the warrant expressly states, that such distribution is to be made as a reward for the services of the persons among whom it is to be made. If, therefore, this Mr. *Pill*, in any fair sense of the word, be considered as the commander, he is entitled to a certain share of the produce of the prizes taken at this time, according to the warrant of his majesty.

The only objection to the claim of the defendant in error, *Pill*, is, that he was not regularly commissioned as commander, but he is, in effect, appointed commander by the customs; for though, literally, they did not appoint him, yet he is appointed under their direction by the revenue officers at *Falmouth*; and, from the time of that appointment, he does all the duty, he incurs all the labor and responsibility which belong to the situation of commander of this vessel, which entitles the person so appointed, according to the terms of the order appointing him, to all the ordinary profits belonging to the office of commander; and the object of his majesty, in this distribution of the produce of prizes, being encouragement to the officers and crew, and being a reward for their services, the appointment satisfies the judgment of the Court of King's Bench, and it is right in giving to this Mr. *Pill*, as real and effective commander, what he would have been entitled to if he had been, in the ordinary way by commission, the commander of this vessel.

Besides the want of a regular commission as commander, an argument was used, from the circumstance of Lieutenant *Senhouse* and his men having been put on *board this vessel for a particular service, namely, for the purpose [*827 of impressing sailors; but, reading the very words of his majesty's warrant, it appears most clearly, that Lieutenant *Senhouse* and part of the crew of the *Conqueror* being on board this ship, did not at all affect the situation of the commander, whoever he was, of the *Hinde* cutter; because his majesty directs one-eighth part of the produce of the prizes to be paid to the port admiral; three-eighths to the captain, officers, and crew of the *Conqueror*, including Lieutenant *Senhouse*, and the officers and men that had been put on board the *Hinde* revenue cutter with him, from the *Conqueror*; the remaining four-eighths to the commander, officers, and crew of the said *Hinde* revenue cutter. So, the very warrant supposes, that, at the same time that Lieutenant *Senhouse* and part of the crew of the *Conqueror* were on board the *Hinde* cutter, there was also a commander on board; and no person answering to that description but *Pill*, and *Pill* sufficiently answering the description, as the Court of King's Bench thought, and as we think also, it seems to us, that thus far the judgment of the Court of King's Bench ought to be affirmed.

There is another part of the judgment of the Court of King's Bench, on which a second question arises, and which respects, in another point of view, the pro

portion which *Pill*, the defendant in error, is entitled to, out of the proceeds of these prizes.

The special verdict finds that the captured vessels were duly condemned as prize; one-fourth of the proceeds was paid to the defendant below, as the general prize agent for custom-house captures; and *Pill's* share, if he is entitled to share as commander, with the deduction of a deputed mariner's share, will be 4626*l.* 19*s.* 3*d.*, or, if his share be subject to such deduction, then the amount of it will only be *4048*l.* 12*s.* 6*d.* If entitled to share only as mate, *828] then a less sum, which, according to the terms of the special verdict, has already been received by *Pill*.

The claim made, and the judgment given by the Court of King's Bench, in favor of *Pill*, is, that he is entitled to the largest sum, namely, the sum of 4626*l.* 19*s.* 3*d.*, upon the ground that there was no deputed mariner on board; but, considering this case and the nature of the appointment of this deputed mariner, and that *John*, a regularly deputed mariner, was on board, we are of opinion, that *Pill* is entitled only to the second sum, that is, the sum of 4048*l.* 12*s.* 6*d.*: because it appears to us, that *John* was never divested of the character of deputed mariner, with respect to his actual situation on board the *Hinde* cutter. At the time when these prizes were taken, it appears that his situation was in no respect changed as a deputed mariner, except that he acted as mate. There was no appointment of him of any sort, as mate. The regular way of appointing a mate is by commission; he might have been appointed mate, if the public service had required it, in the same manner that *Pill* was appointed commander; the commissioners of the customs, (if they had no person immediately in view, to appoint as mate, and if they thought it was necessary that a mate should be appointed, that at least some person should act in the capacity of mate,) might have directed the officers at *Falmouth*, to appoint either some person not on board the ship, or any one person actually on board the *Hinde* cutter, to take upon him the situation and duty of mate. But such thing is not done, and the whole claim of *Pill*, to the largest sum of money, is founded upon the idea that there was no deputed mariner on board, because this man, who was the deputed mariner, did, notwithstanding, act as mate; but there is no succession in this service of a man from the situation of deputed mariner to the *829] situation of mate, *upon the office of mate on board these vessels becoming vacant: nor is there any power given to the person who is the acting or commissioned commander on board these cutters, to appoint their mates. The mates are to be appointed by the commissioner of the customs; and the ground of the decision in favor of *Pill* is, that, although not actually commissioned by the commissioners of the customs in the usual and regular form, yet he was, in effect, appointed by them, because he was appointed by the officers at *Falmouth*, under the direction of the commissioners, in order to carry on the service of this cutter, and so was appointed by the authority of the commissioners. No such transaction passed with respect to *John*; nothing was done to alter his situation, to revoke or make void the effect of his deputation, in the capacity of reputed mariner.

It appears to us, therefore, that there was a deputed mariner on board this ship; the consequence of which is, that the judgment of the Court of King's Bench must be so far reversed as to adjudge to *Pill*, not the sum of 4626*l.* 19*s.* 3*d.*, but only the sum of 4048*l.* 12*s.* 6*d.*

The judgment in other respects is to be affirmed.

Judgment of the Court of King's Bench affirmed, as to the defendant in error being entitled to share as commander, and reversed as to there being no deputed mariner on board.

EASTER TERM, MAY, 16, 1816.

*ANN LAUTOUR et al., v. CHRISTOPHER TEESDALE and
BARBARA ANN his Wife.

[2 Marsh 243. S. C.]

A marriage between two *British* subjects, solemnised by a catholic priest at *Madras*, according to the rites of the catholic church, followed by cohabitation, but without the license of the governor, which it had been uniformly the custom to obtain, is valid.

THIS was an issue directed by the Master of the Rolls, to determine whether the defendants were legally married at *Madras*, in the *East Indies*, on the 17th of *October*, 1808. The cause came on for trial before *Gibbs*, C. J., at the adjourned sittings after last *Trinity* term, at *Guildhall*, when a verdict was found for the plaintiffs affirming the marriage, subject to the opinion of the court on the following case :

Francis Louis Lautoour, by his will dated 4th of *June*, 1807, after bequeathing several legacies, gave all the residue of his personal estate to trustees ; upon trust to divide the whole into aliquot parts, equal to the number of his children at his death, and to stand possessed of one of such aliquot parts for the benefit of each child, and his or her wife, or husband and family, with benefit of accruer or survivorship among the testator's children, in default of issue of any of them as therein mentioned, and appointed the trustees, together with *Ann Lautoour*, during her widowhood, his executors and guardians of his children during minority. And the said testator's will declared, "that if either of his children should, before attaining the age of twenty-four years, intermarry without the consent of his trustees for that purpose first had and obtained in writing, such son or daughter so marrying without such consent, should forfeit one moiety of his or her aliquot share of his estate ; and the trustees thenceforth should stand possessed of one moiety, upon such trusts as would take effect concerning *the same in case such child so marrying were actually dead without [*831 issue.

On the 1st of *October*, 1808, the defendant, *Christopher Teesdale*, being of the age of twenty-six years, and the defendant, *Barbara Ann Teesdale*, of the age of nineteen years, and both *British* subjects, and protestants resident at *Madras*, in the *East Indies*, caused application to be made to Sir *George H. Barlow*, who was then the governor of *Fort St. George at Madras*, with its dependencies, to grant a license for the purpose of authorising a marriage between them at *Madras* ; and such license was accordingly granted on the 1st of *October* ; but in consequence of an application made to the said governor by *James Oliver Lautoour*, a brother of the said defendant, *Barbara Ann*, who objected to such marriage, the said license was afterwards, on the 2d of *October*, revoked and withdrawn. It has for many years been the custom at *Madras*, in the case of marriages between protestant *Europeans*, to require and obtain the previous permission of the governor, signified in writing, to the officiating clergyman of the settlement, and this custom has been strictly adhered to—no instance having appeared to the contrary.

On the 17th of the above month of *October*, the defendants went to the *Black town of Madras*, where they were attended by a *Portuguese* Roman catholic priest, of the name of *Entaguis*, and the marriage ceremony between the defendants was read and performed according to the Roman catholic form by the above mentioned priest, in a small room in the said town, in the presence of *Joseph Baker*, *John Furcy Fortin*, and *Stephen Yttie* ; and the said *John Furcy For-*

tin, and Stephen Ittie, acted as interpreters between the defendants and the said *Entaguis*, when he spoke in the *Portuguese* language. The said *Entaguis*, first informed the *defendants, that unless they were both Roman Catholics, the said ceremony would not render their marriage valid, and that it would be necessary for them to be married on their return to *England*, according to the forms of their own religion; and having stated this, he immediately afterwards, in the *Portuguese* language, asked the defendant, *Christopher Teesdale*, if he would take the said *Barbara Ann*, to be his wife, and the said *Barbara Ann*, if she would take the said *Christopher Teesdale*, to be her husband, to which the said *Christopher Teesdale*, and *Barbara Ann*, respectively assented; after which the defendants exchanged rings, the said *Entaguis* repeating some words in the Latin language.

Both the defendants subscribed their names to a certificate in the *Portuguese* language, which was also subscribed by the said *Entaguis*, and which, when translated into *English*, is to the following purport or effect, viz. "I, the undersigned, certify that I married, this 17th of *October*, 1808, in the presence of Mr. Baker, Mr. Fortin, and Mr. Ittie, a Mr. Teesdale, with Miss *Barbara Ann Lautour*, according to the rites of the Roman church." (Signed) "*S. Entaguis, Christopher Teesdale, Barbara Ann Lautour.*" And the said *Joseph Baker*, and *John Furcy Fortin*, subscribed their names as witnesses thereto.

After the performance of the said ceremony, the defendants remained at *Madras* for about a week, viz. until the 25th of the same *October*, when they embarked on board the *Preston, East Indiaman*, on their voyage to *England*. They did not live together, or pass as husband and wife whilst they so remained at *Madras*, but resided in separate houses five miles distant from each other, the said *Barbara Ann*, retaining her maiden name; but afterwards, in the course of their voyage to *England*, they declared themselves husband and wife, *and cohabited together as such, and they arrived in *England*, in *June*, *833] 1809.

On the 4th day of *July*, 1809, a license was granted by the Faculty office, Doctors Commons, *London*, for the solemnisation of a marriage between the defendants, as *Christopher Teesdale*, bachelor, *Barbara Ann Lautour*, spinster, an infant, with the consent of the trustees, as her guardians; and on the 5th day of the same month of *July*, in pursuance of such license, a marriage was solemnised between the defendants according to the form of the church of *England*, of which the defendants were members, and of which they were both members, in *October*, 1808, when the said first-mentioned ceremony was performed.

The question for the opinion of the court was, whether the defendants were legally married at *Madras*, in the *East Indies*, on the 17th day of *October*, 1808.

If the court should be of opinion that the defendants were not legally married, a verdict was to be entered for the defendants; otherwise the verdict for the plaintiffs was to stand. The case was argued on a former day in this term.

Copley, Serjt., for the plaintiffs. These parties were legally married at *Madras*, at the time mentioned; and there is difficulty in collecting the objections to it, as it appears free from doubt. The subject has been lately exhausted in *Dalrymple v. Dalrymple*, 2 Haggard's Rep. 54., and it will, therefore, be sufficient to state the general authorities in favor of the marriage. This marriage was in an *English* settlement beyond sea, and as the marriage act, 26 G. 2. c. 33, does not extend there, the marriage is good by *English* law. It was not until the reign of king *John* that marriages were required to be solemnised *834] in a church. Afterwards, indeed, no priest was necessary to render the marriage valid and binding, but it was required under ecclesiastical censure to be solemnised in the face of the church. The mere contract *per verba de presenti*, in which consummation was presumed, or *per verba de*

futuro, followed by consummation, was valid between the parties themselves, *Bunting's case*, 4 Co. Rep. 29. S. C. Moore, 169. In that case it was held, that a marriage solemnised in the face of the church and consummated, was void, and the heir illegitimised, by reason of a former marriage contract *per verba de præsenti*, not followed by consummation. In *Jesson v. Collins*, 2 Salk. 437, and in *Wignore's case*, ib. 438, Lord Holt said, that a contract *per verba de præsenti* was a marriage, and not releasable, and so of a contract *per verba de futuro*; but that the latter was releasable. So the law is distinct and uniform, a contract *per verba de præsenti* was a marriage without the intervention of a priest. It is unnecessary to enter on doubted points, whether dower, community of goods, &c. follow on a marriage without a priest; the question here is, whether this was a legal and irrevocable contract, not whether all the consequences follow.

But in this case there was a priest, and, therefore, all doubts are removed. In 1 *Rolls, Abr.*, Tit. Baron and Feme, 341. pl. 21, it is stated, that "If a man and woman be married by a priest in a place which is not a church or chapel, and without any form of the celebration of mass, still it is a good marriage, and they are man and wife." So that if there be a marriage *per verba de præsenti* by a priest, the marriage is complete to all intents; and much more *than is necessary has been done here; *Fieldings' case* [*835 5 State Trials, 610, is precisely in point. The facts throughout were the same in both cases. *The King v. The Inhabitants of Brompton*, 10 East, 282, is also strictly applicable, therefore, on the whole current of authorities, ancient and modern, this is a valid marriage.

Best, Serjt., for the defendants. The authorities which have been cited are not dispted, but the real question has not been touched. The doctrine laid down by Sir William Scott in *Dalrymple v. Dalrymple* is, that according to the law of Christendom, a marriage *per verba de præsenti* is good, though not in *facie ecclesiæ*, but that in almost every state there had been alterations in that law. The law of marriage at *Madras* is controlled by the local laws that prevail there, and these persons are to be considered as persons subject to the law of *Madras* at the time. It is stated on the face of the case, that the law of *Madras* varies from the general law of Christendom, and by the laws of *Madras* this marriage is void. The case states that they applied to the governor for a license, which was granted, but was afterwards withdrawn. For many years it has been the custom at *Madras* to apply to the governor for a license, and no instance has ever been known to the contrary. The parties choose to go without the *Fort*, but this does not enable them to marry; for the law extends to all the *Black town*, the inhabitants of which are within the protection of *English* law, and the custom must be supposed to be coeval with the *British* authority in that settlement. Without a license from the governor to the priest, the marriage by the law at *Madras* is invalid, though it may be good by the general law of Christendom.

**Copley* in reply. It was submitted to the jury to find what the law of *Madras* was. It must be presumed that the law of *England* prevails [*836 until the contrary be shown, and that has not been done; a mere custom has been shown. The reason of obtaining the license from the governor is, that the governor has the power of sending any person out of the country who does not obey him, and by the order of the *East India Company* a license is requisite to the clergyman, but that does not create a law.

Cur. adv. vult.

GIBBS, C. J., now delivered the judgment of the court. (His lordship first stated the case, and then proceeded thus :) Both the defendants are stated to be protestants and *British* subjects, and the place in which the ceremony was performed, was *Madras*, where they resided as part of the *British* settlement there: and the question is, whether under the laws of marriage, operating on

them at *Madras*, this can be considered as a legal marriage. In order to decide this question, it is material to consider who the parties were, and among whom the ceremony took place. Now, *British* subjects settled at *Madras* are governed by the laws of this country which they carry with them, and are unaffected by the laws of the natives. The question, therefore is, whether by the laws of this country, to which they alone are subject, and by which alone their actions are to be governed, this marriage was legal. In this country we judge of the validity of a marriage by what is called the marriage act, but as that statute does not follow subjects to foreign settlements, the question remains whether this would have been a valid marriage here before that act passed. The important point of the case, viz., what the law is by which such a question is to be governed, was *most ably and fully discussed in the case of *837] *Dalrymple v. Dalrymple*, which has been so often alluded to; and the judgment of Sir *William Scott* has cleared the present case of all the difficulty which might, at a former time, have belonged to it. From the reasonings there made use of, and from the authorities cited by that learned person, it appears that the canon law is the general law throughout *Europe* as to marriages, except where that has been altered by the municipal law of any particular place. From that case, and from those authorities, it also appears that, before the marriage act, marriages in this country were always governed by the canon law, which the defendants, therefore, must be taken to have carried with them to *Madras*. It appears also, that a contract of marriage, entered into *per verba de presenti*, is considered to be an actual marriage; though doubts have been entertained whether it be so, unless followed by cohabitation. In the present case, a ceremony was performed, the regularity of which it is necessary to discuss, because it was followed by cohabitation. All that is required, therefore, by the canon law, has been amply satisfied. Indeed, this was admitted on the part of the defendants, and the ground on which they rested was, that this case was excepted from the general rule by the local regulations of the place; that a custom has existed at *Madras*, that when two *British* subjects are married, they should obtain a license from the governor, and that no instance has occurred in which that rule has been dispensed with. That may be the case. It is very possible that there is no priest within that jurisdiction, who would celebrate a marriage without the consent of the governor, but that does not constitute the law, nor can it alter the law which the defendants carried with them; that circumstance, therefore, makes no difference. Another circumstance on which the defendants relied, was, that the priest told the parties, that *838] unless they *were Roman catholics the ceremony would not be binding upon them; in answer to that, it is only necessary to say that he was mistaken, and indeed that circumstance was not much relied on. It follows from what I have stated, that this was a legal marriage; since it was a marriage between *British* subjects, celebrated in a *British* settlement, according to the laws of this country, as they existed before the marriage act; and which, if it had been celebrated here before that statute, would have been valid.

Judgment for the plaintiffs.†

† [See 2 Haggard's Rep. 423, *Harford v. Morris*. ibid. 437, *Middleton v. Janverin*. ibid. 395, *Scrimshire v. Scrimshire*. ibid. 369, *Burn v. Farrar*. ibid. 371, *Reeding v. Smith*. 16 Mass. Rep. 157, *Medway v. Needham*.]

EASTER TERM, MAY 16, 1817.

JEZEPH v. INGRAM.

[3 Moore 189. S. C.]

A., for a good consideration, assigned his interest in a farm, and his cattle and implements of husbandry then in the possession of the sheriff under a writ of *feri facias* at the suit of C., and the property was liberated by the sheriff on his taking security from B. B., after the assignment, managed the property, but A. continued in possession; on the property being afterwards taken in execution at the suit of D. : Held, that it was protected by the assignment to B.

THIS was an action against the sheriff of *Sussex*, for having falsely returned on a writ of *feri facias*, (which the plaintiff had sued out on a judgment, signed in *October*, 1816, against *Newman* indorsed to levy 233*l.* 3*s.* 4*d.*, besides poundage, &c.) that, as to 19*l.*, the defendant had levied it, and as to the residue, *nulla bona*.

The plaintiff, in her declaration, averred that she had, in the King's Bench, recovered judgment against *Newman* for a debt of 460*l.*, and 8*l.* damages, and issued a *feri facias*, directed to the sheriff of *Sussex*, to levy the debt and damages aforesaid, indorsed to levy 233*l.* 3*s.* 4*d.*, besides poundage, &c. and a delivery thereof to the defendant, then sheriff; and that he, by virtue thereof, within his bailiwick, seized goods of *Newman* of *the value of the [*839 moneys so indorsed, and levied the same, but that the defendant had not the money levied in court at the return of the writ, according to the exigency thereof and the indorsement thereon, but, on the contrary, had only a small part thereof, to wit, 19*l.*, and had not paid the residue to the plaintiff, and afterwards returned to the court upon the writ, that he had levied of the goods of *Newman* 19*l.*, and that *Newman* had no other goods in the defendant's bailiwick whereby he might levy the residue; whereby the plaintiff was deprived of the means of obtaining the greater part of the moneys indorsed.

Upon the trial of this cause, at the sittings after *Hilary* term, 1817, at *Westminster*, before *Dallas*, J., it appeared that the plaintiff had entered up judgment in *October*, 1816, against *Newman*, for 230*l.*, on a warrant of attorney given to her for money lent, and had issued a *feri facias* thereon, indorsed to levy 233*l.* 3*s.* 4*d.* and costs, but that the defendant had returned that he had levied 19*l.* only, and as to the residue *nulla bona*. The plaintiff further proved that *Newman* was a farmer, and lived on a farm called *Herring's* farm, whereon was a considerable stock, worth 800*l.* or 900*l.*, which had been and still was, as the plaintiff contended, *Newman's*. To rebut this evidence, the defendant proved that in *October*, 1814, the sheriff being in possession of *Newman's* effects, under an execution at the suit of *Gilbert*, for 577*l.*, *Dunk*, who was a creditor of *Newman* for 190*l.*, in order to liberate those goods, advanced 452*l.* 6*s.* 2*d.*, and that by indenture of the 13th of *October*, 1814, (reciting that *Newman* was indebted in divers sums, to the amount of 452*l.* 6*s.* 2*d.*, and had been pressed, but was unable to pay, and had requested *Dunk* to advance that sum, and proposed that he should take an assignment of *Newman's* effects upon trust, first, for securing repayment of that sum, with interest, and then upon other trusts;) *in consideration of 452*l.* 6*s.* 2*d.* paid to *Newman* and his creditors, by *Dunk*, and other considerations, *Newman* granted and assigned to *Dunk* his farm, then held by him as tenant from year to year, at 75*l.* rent, and all the live and dead stock, cattle, husbandry, tackle, utensils, and implements of husbandry, corn, seeds, hay, straw, grain, manure, and other his

goods, chattels, and effects, then being upon or about the premises, (household goods only excepted,) together with all debts and moneys due to *Newman* on account of the premises, or the produce thereof; upon trust, as well as to the farm as to the effects, that *Dunk* should use and occupy the farm, and manage, conduct, and carry on the business and concerns thereof in such way and manner as he should think proper, for the residue of the term, and should yearly retain out of the profits and produce which should arise, from the occupation of the premises, or, for want thereof, out of the stock, corn, hay, and other goods, interest for the 452*l.* 6*s.* 2*d.*, and pay the rent, taxes, servants' and laborers' wages, and all incidental expenses, and apply the residue of the yearly produce and profits, if any, between *Dunk* and *Newman*, in equal moieties, or otherwise retain such surplus and moiety to go towards the discharge of the 452*l.* 6*s.* 2*d.*; and further, that *Dunk* should, at the expiration of a year, or any time previous to the expiration of the term, if he should think proper, sell so much of the premises as should be in their nature saleable, and should get in such parts as were outstanding, and not in their nature saleable, and out of the moneys to arise thereby, should retain and discharge the 452*l.* 6*s.* 2*d.*, and interest, and all other expenses which *Dunk* might sustain in the execution of the trusts, and should pay the residue, if any, to *Newman*. The deed contained a power of attorney enabling *Dunk* to sue for outstanding debts, and a clause that his release should be "a discharge, and a covenant by *New-*

*841] *man* to aid *Dunk* in the management of the farm and the conversion of the produce. This deed was executed at the office of *Newman's* solicitor, at the distance of six miles from the farm. *Newman* continued to reside in the dwelling house, and to possess his household furniture therein; the name of *Newman's* father still continued on the carts. *Dunk*, immediately after the execution of the assignment, entered on the premises, hired, discharged, and paid servants, bought articles of tradesmen for the use of the farm, sold produce, gave orders relative to the management of the farm; and it was notorious to tradesmen living in the parish that he had the management thereof, and accordingly they would no longer credit *Newman* for articles for the use of the farm. *Newman*, however, did some acts of joint ownership; he hired and employed laborers, whom, however, he referred to *Dunk* for payment, and, so far as the knowledge of some of the farm servants went, bought and sold articles of stock, and gave some orders relative to the management of the farm. The property had been sold by consent after the plaintiff's execution, and the household goods, which were excepted out of the assignment, produced 19*l.*, the residue of the effects, which were claimed by *Dunk*, 230*l.*

For the plaintiff it was contended, that this assignment was invalid, because it was not accompanied with any notorious transfer of possession. The jury found that the conduct of *Dunk* had been just and honorable, and that the money was fairly advanced; but that there was a want of sufficient notoriety of transfer, and gave their verdict for the plaintiff.

Best, Serjt., on a former day, had obtained a rule *nisi* to set aside this verdict, and have a new trial, or to enter a verdict for the defendant.

*842] *Vaughan* and *Copley*, Serjts., now showed cause against the rule. This transaction, though it may have been morally fair, is fraudulent and void, under stat. 13 *Eliz. c. 5*; for *bona fides* is never held to exist in such cases, unless there is a possession consistent with the conveyance; and there is no such possession here. But, laying the statute out of the case, this verdict is maintainable, on the general grounds of law, as settled in the cases of *Stone v. Grubham*, 2 Bulstr. 225, *Twyne's case*, 3 Rep. 80. b., *Cadogan v. Kennett*, Cowp. 432, *Edwards v. Harben*, 2 T. R. 587, (particularly the judgment of *Buller, J.*) *Holbird v. Anderson*, 5 T. R. 235, *Estwick v. Caillaud*, 5 T. R. 420, *Dewey v. Bayntun*, 6 East, 257, and *Wordall v. Smith*, 1 Campb. 332.

This case is to be distinguished from that of *Kidd v. Ruckinson*, 2 B. & P.

59, which turned on the notoriety of the transfer, a point particularly relied on, both by Lord *Eldon*, C. J., and *Heath*, J.

Best, Serjt., who rose to support his rule, was stopped by the court.

GIBBS, C. J. I am very anxious not to incur the imputation of giving up decided cases, and of removing the landmarks which have hitherto guided men in the government of their property. I admit to the counsel for the plaintiff, that he has established the principle, that if a man sells goods, and continues in the possession of them, the sale is void; but the question is, whether this case be not distinguishable from that. I agree that there is some evidence here of a joint possession, and this *leads me to the observation, that this case is not like that of *Edwards v. Harben*, a mere sale without possession, [*843 but it is a middle case between *Edwards v. Harben* and *Kidd v. Rawlinson*. Lord *Eldon*, in the latter case, says, "This seems to me a new case; for here the goods were purchased at a public sale by a person who had never acquired the character of a creditor, and were then lent to the original owner for a temporary and honest purpose;" and he then puts the following case: "If *Kidd* had lent money to *Aburn* to buy these goods, and had then taken a conveyance of them, or a security for his debt thus arising out of the mere act of lending the money; leaving *Aburn* in possession of the goods would not have been a fraudulent act."

Now I may be permitted to put a middle case between the case so put and the cases put by the counsel for the plaintiff. In the cases cited by them there was a mere dry conveyance of the goods; in *Kidd v. Rawlinson* there was an absolute public sale by the sheriff; this is a case between both. The seizure in execution by the sheriff is public and notorious, and I thought at first that the sheriff had actually sold them to *Dunk*, but that is not so: *Dunk* lays down the money to liberate the goods taken in execution; and the sheriff, on taking the security, liberates the goods.

I shall say no more at present, and I have only said thus much, that we may not be thought, in consequence of the course which we are about to adopt, to be ripping up old cases, in the principles of which we have always acquiesced. But I think this a stronger case than some which have been decided, on the one side, and a weaker case than others which have received a contrary decision; and that this middle case requires a further consideration.

I, therefore, think that this case ought to go to a new trial.

**DALLAS*, J. I am of the same opinion, and I do not agree with the doctrine laid down by the counsel for the plaintiff, to the extent to [*844 which they have carried it.

PARK, J. In *Buller's Nisi Prius*, p. 258, it is laid down, that the donor's continuance in possession is not in all cases a mark of fraud, as where a donee lends his donor money to buy goods, and, at the same time, takes a bill of sale of them for securing the money.

BURROUGH, J. I think that this is a case of great importance, and deserving of the most serious consideration. It is a case which, in my opinion, ought to be the subject of further inquiry.

Rule absolute for a new trial.

This case was again tried at the sittings after *Trinity* term, 1817, before *Dallas*, J., when, in addition to the facts proved on the former trial, it appeared, that *Dunk* had also paid the rent, poor-rates, and taxes of the farm, and had purchased stock for the farm; and it was also proved, that *Newman*, as well as *Dunk*, had attended markets, given orders respecting the cultivation, paid rent and taxes, and managed the business, as before the assignment; but it was admitted that *Dunk* received all the proceeds, though he did not make all the payments. The jury, with the approbation of *Dallas*, J., found a verdict for the defendant, which the plaintiff never afterwards moved to set aside.

TRINITY TERM, JUNE, 16, 1817.

*ROBERT ROPER, Gent. v. THOMAS HALLIFAX, Esq.

Lands were settled, subject to a power of sale in trustees, with the consent of the tenant for life. A recovery was afterwards suffered, in which the tenant in tail under the settlement was vouched, and by the recovery deed it was agreed that the recovery should enure in confirmation of the estates created by the settlement, which were antecedent to the estate tail, and in confirmation of the powers annexed to those estates, and subject thereto, to such uses as the tenant for life and tenant in tail should appoint. The tenant for life and tenant in tail afterwards exercised their power of appointment, and the trustees concurred with them in a conveyance of the lands, and they thereby created new powers of sale: Held, that the power of sale in the original settlement was not destroyed.

Where trustees are authorised to give receipts for the purchase-money of land directed to be sold, and such purchase-money is directed to be laid out in the purchase of other lands to be settled in the same manner as the lands sold, a purchaser having paid the purchase-money *bona fide* to the trustees, and having taken their receipt, cannot be affected by any misapplication of the money by them.

ASSUMPSIT for not performing a contract for the purchase of an estate in the county of *Suffolk*. The cause was tried at the *Westminster* sittings, in *Easter* term, 1816, before *Dallas, J.*, when a verdict was found for the plaintiff, subject to the opinion of the court, on the following case:

By indentures of lease and release, bearing date respectively the 7th and 8th of *March, 1788*, (being articles executed previously to the marriage of Miss *Katherine Castle*, with *Edward Bouverie, Esquire*,) then a minor, it was, amongst other things, agreed, that certain manors and freehold estates at *Rougham*, and *Wickenhall*, and elsewhere, in the county of *Suffolk*, of which Miss *Castle*, was seised in fee simple, should be conveyed by her to *John Thomas Batt*, and *Everard Fawkener, Esquires*, their heirs and assigns, to the uses following: To the intent that Miss *Castle*, during the joint lives of herself and Mr. *Bouverie*, might receive an annuity of 300*l.*, by way of pin-money; remainder to the use of *Frederick Robinson*, and *John Crewe*, for ninety-nine years, for securing it; remainder to the use of *Edward Bouverie*, for life; remainder to the use of *John Thomas Batt*, and **Everard Fawkener* and their heirs

*846] during his life, in trust to preserve contingent remainders; remainder to the use of *Katherine Castle*, for life; remainder to the use of the same trustees, their heirs and assigns, during the life of Miss *Castle*, in trust, to preserve contingent remainders; remainder to the use of *Edward Vincent*, and *John Blake*, for five hundred years, for securing portions for the younger children of the marriage; remainder to the use of the first and other sons of the intended marriage, severally, according to seniority, in tail male; remainder to the use of *Edward Vincent*, and *John Blake*, their executors, &c. for six hundred years, for raising additional portions for daughters, on failure of issue male; remainder to such uses as *Katherine Castle*, should appoint; remainder to the use of *Katherine Castle*, in fee. "And it was and is further agreed, that in the said intended settlement there shall be contained a power for the said *Thomas Batt*, and *Everard Fawkener*, or the survivor of them, or the heirs or assigns of such survivor, with the consent and approbation of the said *Edward Bouverie*, the son, and *Katherine Castle*, his intended wife, or the survivor of them, to be testified in manner last herein before directed:" [(viz.) by any deed or deeds, writing or writings under their hands and seals, or his or her hand or seal, to be executed in the presence of two or more credible witnesses] "from time to time to sell or exchange all or any part of the manors, hereditaments, and premises in the said county of *Suffolk*, so agreed to be settled and limited as aforesaid, and all or any part of the hereditaments and premises so to be purchased,

by and with the capital of the said trust funds and securities, so as that the money to arise from the sale thereof be laid out and invested in the purchase of, and that the exchange be made for manors, freehold messuages, lands, and hereditaments, and copyhold or leasehold messuages, lands, or hereditaments, which may lie near to or be intermixed *with, or be proper and convenient to be held and enjoyed with the freehold hereditaments and premises so to be purchased or taken in exchange; but so as that the copyhold and leasehold hereditaments and premises to be so purchased or taken in exchange as aforesaid, do not exceed one-fifth part of the value of the entire hereditaments or premises to be so purchased or taken in exchange; and so as all the hereditaments and premises so to be purchased and taken in exchange, be immediately thereupon conveyed, settled, limited, and assured to the same uses, upon the same trusts, and for the same intents and purposes, as the hereditaments and premises which shall be so respectively sold or exchanged as aforesaid, are by the said intended settlement to be limited and settled as aforesaid." And that there should be inserted in the said intended settlement such or the like clauses or provisoes for the indemnity of the purchaser or purchasers; and for empowering the said trustees with such consent as aforesaid, to lay out and invest the moneys to arise by such sale or sales, of all or any of the said hereditaments, manors and premises in or upon some of the public stocks or funds, or on government or real securities, and for applying the interest or dividends to arise therefrom, from time to time, as were therein before agreed to be inserted in the intended settlement, concerning the moneys to arise from the sale of Mr. *Bouverie's Northamptonshire* estates, which clauses are in the words following, viz. "and that it shall, by the said intended settlement, be likewise provided and declared, that the receipts or receipt of the trustees or trustee for the time being, who shall be so empowered to make such sale or exchange as aforesaid, for the moneys for which the same shall be so sold, shall be a good and sufficient discharge or discharges to the purchaser or purchasers of the hereditaments and premises to be so *sold as aforesaid; and that such purchaser or purchasers, or his, her or their heirs, executors, administrators, [848 or assigns, shall not afterwards be answerable or accountable for any sum or sums of money which in such receipt or receipts shall be expressed to be received, nor for any loss or misapplication or nonapplication of the same, or any part thereof; and that the said trustees so making such sale under or by virtue of the said power, shall by and with the privy and consent of the said *Edward Bouverie*, the father, and *Edward Bouverie*, the son, or the survivor of them, testified by any writing or writings under their hands, or his hand, in the mean time, until a proper purchaser or proper purchasers can be found, wherein to invest the same, lay out and invest the moneys to arise from such sale or sales in the public stocks or funds, or in or upon government or real securities, and shall from time to time pay the interest or dividends thereof to the person or persons who for the time being would be entitled to the rents and profits of the lands and hereditaments so to be purchased as aforesaid, in case such purchases were then actually made." And it witnessed, that the said *Katherine Castle*, did grant and release the said manors and hereditaments to the said *John Thomas Batt*, and *Everard Fawkener*, to the use of herself, until the marriage, and then to the use of said *Batt*, and *Fawkener*, their heirs and assigns, upon trust, when said *Edward Bouverie*, (who was then a minor) should make the settlement of his estates therein agreed upon, to convey and settle said hereditaments to the uses, &c. before stated; and in the said indenture of release is contained the usual power of appointing new trustees, to be exercised by Mr. and Mrs. *Bouverie*, by any writing under their hands and seals, attested by two witnesses.

By indentures of lease and release, bearing date respectively, the 21st and 22d of November, 1788, (being the *settlement executed in pursuance of the articles, and after the marriage between Mr. *Bouverie*, and *Katherine*, his [849

wife) *Mr. Bouverie*, duly conveyed his estates to such uses as were agreed upon by the articles : and in consideration thereof, *Batt* and *Fawkener*, the trustees of *Mrs. Bouverie*, with the consent of *Mr. and Mrs. Bouverie*, conveyed her said estates at *Rougham* and *Wickenhall*, and elsewhere in *Suffolk*, to *Elborough Woodcock*, and his heirs, to such uses as were agreed upon by the articles, and as are herein before set forth. And in the indenture of release of the 22^d of *November*, 1788, are contained the following powers of sale and exchange to be exercised over *Mrs. Bouverie's* property, viz. "Provided also, and it is hereby agreed and declared, by and between the parties to these presents, that it shall and may be lawful to and for the said *John Thomas Batt*, and *Everard Fawkener*, or the survivor of them, or the heirs or assigns of such survivor, with the consent and approbation of the said *Edward Bouverie*, the son, and *Katherine*, his wife, or of the survivor of them, to be testified in manner last herein before directed;" (viz. by any deed or deeds, writing or writings under their hands and seals, or his or her hand and seal, to be executed in the presence of, and to be attested by two or more credible witnesses) "from time to time to sell or exchange all or any part of the manors, hereditaments, and premises in the said county of *Suffolk*, in and by these presents settled and limited as aforesaid, and all or any part of the hereditaments and premises so to be purchased, by and with the capital of the said trust funds, and securities, so as that the money to arise from the sale thereof, be laid out and invested in the purchase of, and that the exchange be made for manors, freehold messuages, lands, and hereditaments, and copyhold or leasehold messuages, lands, or hereditaments, which may be near to or be intermixed with, or be proper and *850] convenient to be held *and enjoyed with the freehold hereditaments and premises so to be purchased or taken in exchange; but so as that the copyhold or leasehold hereditaments and premises so to be purchased or taken in exchange as aforesaid, do not exceed one-fifth part of the value of the entire hereditaments or premises to be so purchased and taken in exchange, and so as all the hereditaments and premises so to be purchased and taken in exchange be immediately thereupon conveyed, settled, limited, and assured to the same uses, upon the same trusts, and for the same intents and purposes, as the hereditaments and premises which shall be so respectively sold or exchanged as aforesaid, are in and by these presents limited and settled as aforesaid; and it is hereby declared and agreed, that when and as the before-mentioned hereditaments and premises, or any part thereof, shall be sold for a valuable consideration in money, the receipt or receipts of the said *John Thomas Batt* and *Everard Fawkner*, or of the survivor of them, or of the executors, administrators, or assigns of such survivor, or of the trustee or trustees, to be by virtue of these presents substituted, in their or any of their place or stead, for all or any part of the moneys to arise from such sale or sales, shall be good and effectual discharge or discharges to the purchaser or purchasers, and his, her, or their heirs, executors, administrators, and assigns, for such sum or sums of money as in such receipt or receipts shall be expressed to be received, and he, she, or they shall not afterwards be obliged to see to the application thereof, or be answerable or accountable for any loss or misapplication of the same, or any part thereof: provided also, that it shall and may be lawful to and for the said trustees and trustee for the time being, from time to time, by and with such consent as aforesaid, and to be testified in manner aforesaid, to lay out and *851] invest the moneys to arise by such sale or sales of all or any of *the said hereditaments and premises in or upon some of the public stocks or funds, or government or real securities; and is hereby agreed and declared that the interest or dividends to arise therefrom from time to time, shall be paid to the person or persons, for the time being, who would be entitled to the rents and profits of the lands and hereditaments so directed to be purchased as aforesaid, in case the same were then actually purchased." And in the said inden-

ture of release is contained a power of appointing new trustees, as prescribed by the articles.

By deeds of the 1st and 2d of *March*, 1804, Mr. and Mrs. *Bouverie*, in pursuance of their power, duly appointed *Robert Blake*, Esq., to be a trustee in the room of Mr. *Faukner*, who was then dead.

And by the same indentures, and by indentures of lease and release of the 3d and 4th of *March*, 1804, all the trust estates were duly conveyed to Mr. *Batt* and Mr. *Blake*, and their heirs, to the uses, upon the trusts, &c. of the settlement of *November*, 1788.

By indentures of lease and release bearing date respectively the 28th and 29th of *June*, 1811, the release made between the said *Edward Bouverie* of the first part, *Everard William Bouverie*, his eldest son by *Katherine* his wife, of the second part, *William Ainge* of the third part, and *Richard White* of the fourth part, after reciting (*inter alia*) that Mr. *Bouverie* and his son were desirous of destroying the estates tail created by the settlement of 1788, and all remainders and reversions expectant or depending on the said estates tail, and of settling the estates therein comprised, subject to the estates then existing therein previous to the estate tail of the said *Everard William Bouverie*, to the uses aftermentioned: it is witnessed, that for barring the estate tail, &c., the said *Edward Bouverie* did grant release and confirm to the said *William Ainge* and his heirs, *during the joint lives of the said *Edward Bouverie* and *William Ainge* (amongst many others,) the said estates at *Rougham* [*852 and *Wickenhall*, and elsewhere in the county of *Suffolk*, to hold to the said *William Ainge* and his heirs during such joint lives; to the intent that the said *William Ainge* might become tenant to the *præcipe* in two recoveries, in which said *Richard White*, was to be demandant, and the said *Everard William Bouverie* vouchee; and it was thereby agreed that the recoveries, when suffered, should enure "to the several uses which under or by virtue of the said indentures of lease and release of the 21st and 22d days of *November*, 1788, were immediately previously to the sealing and delivery of the indenture now in recital, or the lease for a year, on which the same is grounded, subsisting or capable of taking effect in the said hereditaments, antecedent to the uses by the aforesaid indenture of the 22d day of *November*, 1788, limited to the first and other sons of the said *Edward Bouverie* by the said *Katherine* his wife, severally and successively, according to their respective seniorities, in tail male; and to the further use that all and singular the trusts, powers, exemptions, and privileges, upon or to the said several uses charged, annexed, relating, collateral, or limited to any person or persons seised of or entitled to the same, might still accompany the said several uses, and be vested in and belong to, and be exercised by, the persons seised of or entitled to the same uses, or in whom the same powers were vested, to and for the end, intent, and purpose, and so that the said several uses, trusts, powers, exemptions, and privileges might, by the indenture now in recital, and the recoveries to be suffered in pursuance thereof, be to all intents, effects, constructions, and purposes, established or continued, and corroborated or confirmed; and after the expiration or sooner determination of the said several uses, and in the mean time subject thereto, and *subject to the several powers, and to the uses or estates to be created [*853 thereby, to such uses upon such trusts, &c., as the said *Edward Bouverie* and *Everard William Bouverie* should, by any deed or writing, to be sealed and delivered in the presence of, and attested by, two witnesses, appoint, and, in default of such appointment, to the use of the said *Everard William Bouverie* in tail male, remainder to the use of the said *Edward Bouverie* in fee."

In *Trinity* term, the 51st of *Geo. 3.*, recoveries were duly suffered, in pursuance of the last-mentioned indentures of lease and release, in which the said *Everard William Bouverie* was vouched and vouched over.

By indentures of lease and release, bearing date respectively the 20th and 21st of *December*, 1811, the release being between the said *Edward Bouverie*

of the first part, the said *Everard William Bouverie* of the second part, the said *John Thomas Batt* and *Robert Blake* of the third part, the Rev. *John Bouverie* of the fourth part, *Henry Bouverie*, Esq., and the said *William Ainge* of the fifth part, the Hon. *Philip Pleydell Bouverie* and *John Dorrien*, Esq., (trustees duly appointed in the room of *Edward Vincent* and *John Blake*, both deceased, formerly trustees acting under the said indenture of settlement of the 22d of *November*, 1788,) of the sixth part, and the Right Hon. *John* then Lord *Crewe* (at the date of the same settlement called *John Crewe*, Esq., and which said *John* then Lord *Crewe* had survived the said *Frederick Robinson* his co-trustee named in same settlement,) of the seventh part; reciting (*inter alia*) the indentures of lease and release of the 21st and 22d of *November*, 1788, and 28th and 29th of *June*, 1811; and also reciting that the said *Edward Bouverie* and *Everard William Bouverie* were severally desirous of limiting and settling the said several manors and other hereditaments comprised in and

*854] conveyed by the said indenture of release of the 29th day of *June* last, and the said recovery suffered in pursuance thereof, to the uses after declared concerning same: it was witnessed, that, pursuant to and in execution of the power and authority to the said *Edward Bouverie* and *Everard William Bouverie*, for that purpose given by the said indenture of release, of the 29th of *June*, 1811, and the said recovery, and of every power or authority, they the said *Edward Bouverie* and *Everard William Bouverie*, did, by the then present deed or instrument in writing duly executed, direct and appoint that the said estates at *Rougham* and *Wickenhall*, and elsewhere in *Suffolk*, together with divers other hereditaments, should, immediately after the sealing and delivery of the then present indenture (but subject and without prejudice to the uses, estates, and powers in and by the same indenture of release, limited and raised, or established and confirmed antecedently to the joint power of appointment thereby given and preserved to the said *Edward Bouverie* and *Everard William Bouverie*,) be and remain to the uses and upon the trusts thereafter expressed and declared. And it was witnessed, that, in consideration of 10s. by the said *John Bouverie* paid to the said *John Thomas Batt*, *Robert Blake*, *Edward Bouverie*, and *Everard William Bouverie*, they the said *John Thomas Batt* and *Robert Blake*, according to their several estates and interests in the hereditaments thereafter mentioned to be thereby released, and so far as they respectively could or ought to do, at law and in equity, and not further or otherwise, at the request and by the direction of the said *Edward Bouverie* and *Everard William Bouverie*, testified by their severally being parties to and executing the now stating indenture, did bargain, sell, and release; and the said *Edward Bouverie* and *Everard William Bouverie* did grant, release, and confirm, unto the said *John Bouverie* and his heirs, all and singular the estates thereby appointed

*855] as aforesaid, to hold the same (but subject and without prejudice, as appears by the then present indenture,) unto the said *John Bouverie*, his heirs and assigns, to the uses after declared. Declaration that as well the limitation or appointment, as the grant and release thereinbefore contained, should severally enure to the uses, &c., after mentioned, that is to say, as to all the manors and hereditaments thereinbefore appointed and released (except such part or parts thereof as was or were formerly the estate and inheritance of the said *Katherine Bouverie*, or of her ancestors,) to certain uses therein mentioned; and as to such of the said manors and hereditaments, whereof no use was thereinbefore declared (being the estates of *Rougham* and *Wickenhall*, and elsewhere in *Suffolk*,) it was thereby declared, that the said appointment and release should enure to the following uses, *viz.*, to the intent that the said *Katherine Bouverie* might, during the joint lives of herself and the said *Edward Bouverie*, receive thereout the annuity of 300*l.*, provided for her by the settlement of 1788, and also might have and enjoy the powers and remedies by that indenture provided, for securing the payment of the same, to the intent that the said annuity and the said powers and remedies, might be pre-

served and continued, corroborated and confirmed; and subject thereto, to the use of the said *John Lord Crewe* for ninety-nine years, to commence from the date of the said indenture of the 22d of *November*, 1788, by way of continuation, corroboration, and confirmation of the term of ninety-nine years, thereby limited, and also by way of continuation, &c., of the trusts thereby declared of same term; remainder to the use of the said *Edward Bouverie* and his assigns, for life, *sans waste*, remainder to the use of the said *John Thomas Batt* and *Robert Blake*, and their heirs, during his life, to preserve contingent remainders; remainder to the use of the said *Katherine Bouverie* and her assigns for her life, *sans waste*, by way of corroboration of the life estate, limited to her by the said *settlement of 1788; remainder to the use of the said *John Thomas Batt* and *Robert Blake*, and their heirs, during her life to [856 preserve contingent remainders; remainder to the use of the said *Philip Pleydell Bouverie* and *John Dorrien*, their executors, &c., for five hundred years from the decease of the survivor of said *Edward Bouverie* and *Katherine* his wife, by way of continuation, corroboration, and confirmation of the term of five hundred years limited by the said settlement of 1788; and also by way of continuation, &c., of the trusts thereby declared of the said term; remainder to the use of the said *Everard William Bouverie* and his assigns, for life, *sans waste*; remainder to the use of the said *John Thomas Batt* and *Robert Blake*, and their heirs, during his life, to preserve contingent remainders; remainder to the use of the first and other sons of the said *Everard William Bouverie* successively in tail male; with divers remainders over in favor of Mr. *Bouverie* younger sons and daughters, and their respective issue in strict settlement. And in the said indenture was contained the following proviso, "Provided always, and it is hereby agreed and declared, by and between the said parties to these presents, that it shall and may be lawful to and for the said *John Thomas Batt* and *Robert Blake*, and the survivor of them, and the executors, administrators, and assigns of such survivor, at any time or times hereafter, at the request and by the direction in writing of the said *Edward Bouverie* during his life, and after his decease, then at the request and by the direction in writing of any person, who, by virtue of the limitations hereinbefore contained, shall be tenant for life in possession of any of the manors and other hereditaments hereby severally limited in strict settlement, to dispose of and convey, either by way of absolute sale, or in exchange for, or in lieu of, other manors, lands or hereditaments, to be situate somewhere in that part of *Great Britain* called *England*, or in the principality of *Wales*, all or any part of the said manors, hereditaments, and *premises, of which the said *Edward Bouverie* or [857 such other person shall be such tenant for life as aforesaid, and the inheritance thereof in fee simple, to any person or persons whomsoever, for such price or prices in money, or for such equivalent or recompense in manors, lands, and hereditaments, as to them the said *John Thomas Batt* and *Robert Blake*, or the survivor of them, or the executors, administrators, or assigns of such survivor shall seem reasonable; and that for the purpose of effectuating such dispositions or conveyances, but not for any other purpose, it shall and may be lawful to and for the said *John Thomas Batt* and *Robert Blake*, and the survivor of them, and the executors, administrators or assigns of such survivor, with such consent and approbation, and so testified as aforesaid, by any deed or deeds, instrument or instruments in writing, sealed and delivered by them or him in the presence of, and attested by two or more credible witnesses, absolutely to revoke, determine, and make void all and every or any of the uses, trusts, powers, and provisos hereinbefore limited, declared, and expressed of or concerning the said hereditaments and premises so proposed to be sold, or conveyed in exchange as aforesaid, or any part or parts thereof respectively; and by the same, or any other deed or deeds, instrument or instruments in writing, to limit, declare, direct, or appoint any use or uses, estate or estates, trust or trusts of the said premises, or any part or parts thereof, which

it shall be thought necessary or expedient to limit, declare, direct, or appoint, in order to effectuate such sales, dispositions, and conveyances as aforesaid: and also that, upon any such exchange as aforesaid, it shall and may be lawful for the said *John Thomas Batt* and *Robert Blake*, and the survivor of them, and the executors, administrators, or assigns of such survivor, to give or receive any sum or sums of money by way of equality of exchange; and also, that *858] upon payment of the money to arise by sale of the *said premises, or any part thereof respectively, or for any money to be paid by way of equality of exchange, or any part thereof, it shall and may be lawful for the said *John Thomas Batt* and *Robert Blake*, and the survivor of them, and the executors, administrators, and assigns of such survivor, to sign and give receipts for the money for which the same shall be so sold, or so to be paid by way of equality of exchange as aforesaid, and that such receipts shall be sufficient discharges to the person or persons paying the same respectively, for the money for which the same shall be so given, or for so much thereof, as in such receipts shall be acknowledged or expressed to be received; and that the person or persons paying the same respectively, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accountable for any loss, misapplication, or non-application, of such moneys, or be in any wise obliged or concerned to see to the application thereof, or any part thereof respectively." With the usual direction to lay out the sale moneys in the purchase of lands to be settled to the uses before named.

By articles of agreement of the 6th of *February*, 1813, made between the said *Edward Bouverie* of the one part, and *Robert Roper* of *Wickenhall*, in *Suffolk*, gentlemen, (the plaintiff) of the other part; the said *Edward Bouverie* agreed to sell, and the said *Robert Roper* agreed to purchase at the price of 30,000*l.*, the manor of *Wickenhall*, in *Suffolk*, and the messuage, lands, and hereditaments, called *Wickenhall* farm, and the inheritance in fee simple in possession thereof; 10,000*l.* part of the purchase money to be paid on the execution of the conveyance, and the residue to be secured by mortgage of the premises till the 11th of *October*, 1815; and that the said *Edward Bouverie* should on or before the 11th of *October*, 1813, upon the receiving the said 10,000*l.*, and such mortgage, execute proper conveyances of the said estates under a good title unto the said *Robert Roper*, his heirs and assigns.

*859] *Robert Roper* paid the said 10,000*l.* to Mr. *Bouverie's* trustees upon their receipt, but took no conveyance. On the 17th of *January*, 1816, he resold the estate by auction to Mr. *Hallifax* (the defendant) for 20,000*l.* (exclusive of timber, which was to be taken at a valuation,) and the defendant paid a deposit to the auctioneer of 3,000*l.*

The defendant had not completed his purchase in consequence of an objection taken by his counsel to the title on the points reserved for the opinion of the court, viz.

1st, Whether a conveyance to a purchaser under the power of sale, directed to be reserved by the articles of *March*, 1788, and the power of sale actually reserved by the settlement of *November*, 1788, would be affected if the purchase money should not be laid out, and the lands purchased therewith settled as mentioned in the said articles and settlement?

2d, Whether the power of sale contained in the settlement of *November*, 1788, was destroyed by the recovery of 1811? If not,

3d, Whether the power was not released, and at an end by the settlement of *December*, 1811? And if not,

Whether a good title could be made to the defendant by the plaintiff, and Mr. and Mrs. *Bouverie* and their trustees, under an exercise of the power of sale in the settlement of *November*, 1788, and also of the power of sale contained in the settlement of *December*, 1811, or under one of those powers?

If the court should be of opinion, that a good title should be so made, then

the verdict was to be entered for the remainder of the purchase money, viz. 17,000*l.*; if not, a nonsuit was to be entered.

The case was twice argued, in *Trinity* term, 1816, by *Rosanquet*, Serjt., for the plaintiff, and *Copley*, Serjt., for the defendant; and in *Michaelmas* term, 1816, by *Lens*, Serjt., for the plaintiff, and *Best*, Serjt., for the defendant.

*Arguments for the plaintiff. The first question is, whether the power of sale in the settlement of *November*, in 1788, contains any condition which can affect the purchaser. The words, "so as that the money to arise from the sale thereof, be laid out and invested in the purchase of other lands, &c.," might afford grounds for contending, on the authority of *Doe dem. Willis v. Martin*, 4 T. R. 39, that, unless there were lands previously purchased and settled to the same uses, the trustees could not sell. That case, however, was a case of fraud; nevertheless, it is not denied that Lord *Kenyon* relied on the words making the power of sale conditional. But there is this material distinction between that case and the present, that in the former, there was no clause declaring that the receipts of the trustees should discharge the purchaser. Lord Chancellor *Bacon*, in his argument in *Sir John Stanhope's* case upon the effect of the words *ita quod* in a power of revocation and new appointment, thought it necessary to press very strongly the apparent intent of the parties in that particular case. On the intention of the parties here, there can be no doubt. There is not any thing to fix the time when the purchase shall be made; on the contrary, the receipt of the trustees is to discharge the purchaser, and the purchase money is to be laid out in the funds until a purchase offers; the parties thus contemplating an interval. That the words *ita quod* bind the trustees is clear, but as to the purchaser, it is expressed that their receipt shall discharge him, and further, that he shall not be bound to see to the application of the money, the condition, therefore, as to him, can have no operation. No case can be cited where there is a clause discharging the purchaser from seeing to the application of the purchase money in which he is bound by the preceding condition.

*The next question is, whether the power of sale is destroyed by the recovery. All the books agree, that a power is nothing more than a modification of a use. The settler, instead of declaring the uses himself, directs that another person shall have a power of declaring to what uses the estate shall be, and when the power is executed, it is the same thing as if the donor of the power had himself declared the uses. *Goodhill v. Brigham*, 1 Bos. & Pull. 192. In *Wright v. Wakeford*, 17 Ves. 457, the Lord Chancellor says, that the execution of a power is a limitation of a use; and that, upon the execution of the power, the estate or interest created arises as if it had been expressed in the original settlement. This power was manifestly to be executed in the lifetime of Mr. and Mrs. *Bouverie*, or the survivor of them, their consent or that of the survivor being made requisite, and, when executed, has the same operation as if the use had been declared at the time of the execution of the settlement. The question then, is, where is the use to come in. It is a use antecedent to the estate tail; for, if it take effect at all, it must take effect before the estate tail comes into possession. It is not, therefore, a conditional limitation which can affect an estate tail already in possession, but it is one which must take effect, if at all, before the estate tail exists. A recovery, though it destroys all remainders and contingent interests incident to or expectant on the estate tail, yet clearly does not affect any estate or interest antecedent to the estate tail. Consequently, the use arising on the execution of this power is not affected by the recovery. *Page v. Hayward*, 2 Salk. 570, is not applicable to this case; it merely decided, that, where there is an estate tail with a limitation over on the happening of a certain event, such limitation is barred by a recovery suffered before the happening of the event. In

Pullen v. Ready, 2 Atk. 587, Lord *Hardwicke* certainly states the effect of a recovery in very general terms, but his meaning is clear. He says, "the general notion of common recoveries is, that it bars estates tail, remainders over, and extinguishes all conditions and powers, and all incidents annexed to an estate tail;" but he evidently means all such conditions and powers as are to defeat the estate tail, when the estate tail has taken effect. In *Pledgard v. Lake*, Cro. Eliz. 718, *A.* being tenant for life with remainder to *B.* in tail, *B.* leased for a term of years, to commence from the decease of *A.* *A.* and *B.* afterwards suffered a recovery, and it was held that the term of years was not destroyed by the recovery. In this case the power remains notwithstanding the recovery. But supposing it to be considered, that the power is destroyed by the recovery so far as it relates to the estate tail, yet clearly it is not destroyed so far as relates to any estate preceding the estate tail. The distinction has been often admitted between powers under the statutes of uses and conditions at common law, that the former may be destroyed in part or apportioned, though the latter cannot. A lease for years by one who has a power of revocation does not suspend the power, but he may revoke for the reversion, *Bullock v. Thorne*, Moore, 615. And if one having a power, lease for years, and levy a fine to confirm the lease, the power is not gone but is suspended for the term. So, in this case, the power is at all events good as to the previous life estates and the term of five hundred years. The reason why a recovery is said to destroy a power is, that it displaces the estate, but here it does not displace the estate tail. The donees of the power are not parties to the recovery. But, supposing Mr. *Bouverie* to have been the donee of the

*863] power, he has done all that every donee of a power, *who wishes to preserve his power, does in like cases. Mr. *Bouverie* conveyed for the joint lives of himself and the tenant to the *præcipe* only, leaving a reversion in himself, according to the general practice, and, as was expressly done in a marriage settlement in the family of Lord *Hardwicke*, settled by Mr. *Booth* for the purpose of preserving all the powers; the same practice is recommended in the note to *Co. Litt.*, 203 b. note 94; and it will be attended with very great inconvenience, if this theory, which has been generally adopted by conveyancers, is not to be supported. This power to Mr. *Bouverie* is certainly appendant, so far as it affects his own estate; but it is in gross as it affects, and is to take effect out of, the estate of others. The doctrine on this point is very fully stated in *Edwards v. Slater*, Hard. 410. The donee of a power in gross cannot destroy it by an innocent conveyance, because it passes nothing but that which he had; but, if tenant for life convey by feoffment, fine, or recovery, those conveyances will work an estate by wrong, and create and pass an entire new fee. In *King v. Melling*, Vent. 225, Lord *Hale* says, "Here the recovery does not only bar the estate, but all powers annexed to it; for the recompense in value is of such strong consideration, that it serves as well for rents, possibilities, &c., going out of and depending upon the land, as for the land itself. So fines and feoffments do ransack the whole estate, and pass or extinguish, &c., all rights, conditions, powers, &c., belonging to the land, as well as the land itself." Thus far it is admitted, that a recovery by donee of a power in gross bars the power, but an innocent conveyance does not. Here Mr. *Bouverie* conveyed by lease and release to the tenant to the *præcipe*, and did not concur in the recovery, so that the power is not affected. In *Albany's*

*864] *case, 1 Rep. 110, it is said, that a power may be extinguished by a release from the donee to him who hath an estate of freehold in the land; but, in this case, the releasee was only tenant under the lease for a year, and had no freehold or estate, over which the power was to operate. In *Parsons v. Freeman*, 3 Atk. 741, it is said, "If a conveyance or recovery be for a particular purpose, it shall revoke no further than to answer that purpose."

As to the question, whether the power has been destroyed by the indentures of lease and release of *December*, 1811, much of the preceding argument

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applies. The intent is most clear. They recite the former deeds, and the intent of the parties to confirm and corroborate the estates for life to Mr. and Mrs. *Bouverie*, and the term for five hundred years. They are, indeed, in of the old uses. If one seised of an estate *ex parte materna*, convey by fine or recovery, and limit the estate to himself for life, with remainder to strangers in tail, with remainder to his own right heirs, and the issue in tail fail, the heir of the settlor *ex parte materna* will inherit. This shows that by the mere operation of the assurance nothing is changed or destroyed. *Abbot v. Burton*, 2 Salk. 590, *Co. Litt.* 12 b. It being clearly the intention of the parties to preserve all powers, and the conveyances being by lease and release, which does not destroy any but appendant powers, this is not a case in which the recovery can be held to destroy the powers.

Arguments for the defendant. This power is either a conditional power, and therefore, the title such as a purchaser is not bound to accept; or, if not, it was barred by the recovery. Postponing the question, whether the power was conditional, the use created by the *power may be considered a contingent shifting use, or a conditional limitation; on the execution of the [*865 power, the new uses take effect in the place of the former uses. A shifting use, or a conditional limitation, is nothing more than the substitution of new uses, and the new uses, the creation of which were in this case authorised, might have taken effect in the same manner as the uses which might arise on a limitation to *A.* in tail until *B.* return from *Rome*, and then to *C.*; or to *A.* in tail so long as a certain tree should stand, and then to *C.* The power is, therefore, gone. *Benson v. Hodson*, 1 Mod. 111, supports much stronger doctrine than is contended for here. Lord *Hale* there mentions a case in which a man made a gift in tail, determinable upon his non-payment of a thousand pounds, with remainders over; the tenant in tail, before the day of payment, suffered a recovery, and did not pay the money; yet, because he was tenant in tail when he suffered the recovery, by that he had barred all. Wherever there is a collateral condition, by which the estate tail may be defeated, it may be barred by a recovery. *Page v. Hayward*, 2 Salk. 570. But, it has been said, that, in this case, the power must be considered with reference to the contents of the deed creating it; by which it appears that the power must necessarily be exercised, if at all, before the estate tail could come into possession. This is too refined a mode of considering it. It here displaces entirely the old estates, and substitutes new uses; and that is the true definition of a shifting use, and being such, it is barred by the recovery. In *Page v. Hayward*, there was a condition annexed to the estate tail, that, if the tenant in tail married any other person than a *Searle*, the estate should go to *J. S.*; and it was held, that she might destroy this condition *annexed to the estate by suffering a recovery before she married. This is a power connected with, annexed to, [*866 and incidental to this estate, not only to the life estate, but to the estate tail also; and therefore, destroyed. Those cases are confirmed by Lord *Hardwicke*, in *Pullen v. Ready*, 2 Atk. 587; and his judgment in that case applies very strongly here. And in *Nicolls v. Sheffield*, 2 Bro. C. C. 215, a shifting use was held not to be too remote, expressly on the ground of its being barrable by recovery. The sole question here is on the effect and operation of this recovery, without regard to the intention of the parties; neither is it material that the parties have created another power, which may answer the same purpose. It has been said, that this power can be affected only so far as it is appendant, and not so far as it is in gross. That may be true as to innocent conveyances, but this being by common recovery, the whole power is swept away and destroyed, and that by the nature of the assurance. The intention may operate as to innocent conveyances, but as to a recovery, the strict rules of law operate, and the intention cannot be referred to. Here, therefore, the power cannot be apportioned, but is wholly gone. Besides, the conveyance by lease and release destroys this power. What has been said with regard to Mr. *Bouverie* having a rever-

sion left in him, and the power being saved by this device, that may be true of some powers, but not of a power of sale and exchange. If a conveyance of his whole estate would have vacated the power, a conveyance of a part must affect it. There is no reservation of the power out of the estate of the freehold created by him. After the alienation of the greater part of his estate, *867] how can he execute a power affecting the whole? Then there is a *clause for defeasance on non-payment of 100,000*l.*, and it is said that the party is, therefore, in of his old use; that position is very doubtful, and no authority has been cited in support of it. The estate may be the same estate; but it by no means follows that it brings back with it all the old uses, after they have been once extinct.

The next point is as to the effect of the settlement of 1811. If the power be not destroyed by the recovery, it is released by this settlement. A power may indeed be given to a person without any estate, but, here, a legal estate having been given to the trustees, who are to execute the power, and they having released their legal estate, they have released that wherewith they were to execute the power. By this settlement, they convey all the estates (subject to the former uses, estates, and powers,) to certain uses thereby limited. As to this exception, the effect would have been similar had it not been inserted; the parties could not affect the prior estates, and the insertion of it cannot influence the decision of the question now under consideration. The intention of the parties in this respect was clear to destroy the old power, and create a new one. All the estate being in the parties, they had full power of doing so, if they intended to do it. Why, then, is their intention not carried into effect? They never could intend the old powers of sale and exchange to remain in force; for, in the new deed, they give new powers of sale and exchange. This must be decisive; for no reason can be given for the creation of new powers, if the old ones subsisted. It surely cannot be contended, that the whole of this new power is to be struck out of the deed. It is also to be observed, that the old power is given to the heirs of the surviving trustee; the new power to the executors or administrators of the surviving trustee. The *operation of the deed of 1811, *868] was to release this power.

Reply. This power cannot be said to be connected with the estate tail; it affects the whole estate certainly, but it is antecedent to and wholly unconnected with the estate tail. The estate created by the execution of this power is clearly a shifting use; but it does not follow that it is therefore destroyed by a recovery. A recovery affects such shifting uses only as are dependent or subsequent to the estate tail; but this is antecedent to it, and therefore not affected. In *Nicolls v. Sheffield*, the judgment of the Master of the Rolls was given with reference to such shifting uses as would arise after the estate tail. In *Page* and *Hayward*, the court held that the estate tail took effect immediately, and, therefore, the condition was dependent on the estate tail. Here, the estate tail has not yet taken effect. The doctrine laid down in *Pullen v. Ready*, is admitted; that is, that all conditions and powers affecting the estate tail, and all incidents to it, are destroyed. But this power is not incidental; so far from it, that, if exercised, it will destroy the estate tail. *Benson v. Benson*, does not go further than the other cases. This power, if exercised at all, must be exercised before the estate tail is to arise; and this circumstance is very material. As to the effect of the settlement of 1811, it is argued, that because the trustees conveyed the lands, their power is gone; but it is to be observed, that they conveyed conditionally only, reserving the power. The utmost consequence that could ensue would be, to render the power collateral, or in gross. As to the intention to destroy the power, if the intent be taken into consideration, it must be taken as it is expressed, and the intent is declared not to destroy it. *869] The parties have been rightly advised, and the *powers preserved. The creation of a new power, which is to operate by the act of different

persons, affords no argument that the parties meant to destroy the former powers.

Cur. adv. vult.†

GIBBS, C. J., now delivered the judgment of the court. (After stating the facts of the case, and observing that the powers and trusts created by the deed of 1788, were excepted out of the recovery deed of 1811.) This is a reference to the court, not generally, but on certain points only.

On the first point, we are of opinion that a conveyance to a purchaser under the power of sale in the deed of 1788, would not be affected by the event stated in the question. It is stipulated that the receipt of the trustees shall be sufficient, and no subsequent recovery can affect it. This case is very distinguishable from *Doe dem. Willis v. Martin*. The question there was, whether money had been *bona fide* paid to the trustees. The money had been put into the hands of an infant in his cradle, and after some ceremony having been gone through with a pen, it was taken out of his hands and paid over to the tenant for life. In this case, we are of opinion that the receipt of the trustees is sufficient. The next question is, whether the power was destroyed by the recovery of 1811. It is a naked power in the trustees, to be exercised with the consent of Mr. and Mrs. *Bouverie*, or the survivor. It is said by the defendant that this power was destroyed by the recovery. This proposition, so contrary to justice and to the intent of the settlers, it is incumbent on those who contend for it, to establish by principle or authority *and they have done neither. [870 This is a power antecedent to the estate tail, which, if ever it be exercised, must act on the land antecedent to the estate tail, and before the estate tail can take place. This power remains undisturbed by the recovery.

It is said, that if not destroyed by the recovery it was destroyed by the subsequent deed, in which the trustees were granting parties. We have much doubt whether it could be destroyed by the trustees joining, being a mere naked power; but it is clear that they did not destroy it. The deed only operates on so much of the estate as follows, and is dependent on the estate tail; all that is precedent to the estate tail is, by the very terms of the deed, left untouched, and therefore is not destroyed.

The next question is, whether a good title can be made by Mr. and Mrs. *Bouverie*, under the deeds of 1788, and 1811, or either of them. It is not necessary to say any thing on the deed of 1811, because we are of opinion that a good title may be made under the deed of 1788, by the trustees. Supposing these to be the questions on which the fate of the cause depends, (and I do not mean to say that there were any others,) we are of opinion that the plaintiff is entitled to recover. We say that this is the opinion of the court, because we understood that my brother *Dallas*, who was unfortunately prevented by sickness from coming here, was of the same opinion with us.

Judgment for the plaintiff.

† *Note.* In the case as it stood in the briefs, the 100,000*l.* clause was not mentioned but it was in the paper book.

AN
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A. as administrator of B., the lessee of certain premises, took possession of them on B.'s death, but paid no rent. The premises proved to be unproductive, and, after eight months, A. made the lessor a verbal offer to surrender them. In an action brought against A., in his own right, for rent due after the decease of B.: Held, that A. was not chargeable. *Remnant v. Bremridge.* Page 191

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The court set aside the securities for an annuity after a lapse of six years, for two of which it had been paid, on the ground

that the consideration money was not the property of W. as stated in the securities, but of C., and that the name of the person, on whose behalf the money was paid, was not truly set forth in the receipt thereon, C. being alive, and having claimed the consideration money and the annuity as his own. *Williams v. John Pearce Hockin and Hannah Read.* 435

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A sheriff's officer, in execution of mesne process, peaceably obtained entrance by the outer door of the house, and followed the defendant to his bed room, who locked himself therein, and refused to open the door, though informed by the officer of his business. The officer then waited in the garden at the back of the house all night, and in the morning touched the defendant through a broken pane of glass, requiring him to surrender, and then, entered the room in which the defendant was, through the window, which the officer, in entering, further broke, and arrested the defendant: Held, that the officer was justified. *Lloyd v. Sandilands.* 250

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Assumpsit in *K. B.* that *B.* was indebted to *A.* in a certain sum for certain commission and reward due and of right payable from *B.* to *A.*, for and in respect of *A.*, at *B.*'s request, having guaranteed the payment of divers goods by *A.* before then sold, as *B.*'s factor to third persons, and that, in consideration thereof, *B.* afterwards promised to pay *A.* the said sum. Verdict for *A.*, and judgment thereon.

The court (*Cam. Scacch.*) affirmed the judgment on error. *Solly v. Weiss*. 371

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The court refused to make a rule for an attachment absolute against *A.* for the nonproduction of the indentures according to their order, on his swearing that he could not comply with the order, not having the indentures in his possession; that he had never destroyed them; and that he had made diligent search for them, and repeatedly inquired for them, but could find no trace of them. *Cooke v. Tanswell*. 131

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An attorney had sent the money regularly for his certificates for three years by his clerk, who misapplied the money, and failed to purchase them. The court upon application for his readmission as an attorney, granted a rule absolute, in the first instance, *conditioned* for the production of the Attorney General's consent. *In re James Winter*. 129

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AUCTIONEER.

A purchaser of an estate by public auction, deposited a sum with the auctioneer as

part of the purchase money, until the vendor made out a good title, according to the conditions of sale. No good title was made out; but the treaty was kept open with the auctioneer for four years from the time of the sale, and no demand had been made on him for the repayment of the deposit: Held, that, in such case, the auctioneer is not liable to the purchaser for interest on the deposit money. *Lee and another v. Munn*. 45

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1. After issue joined, and notice of trial given, a cause was referred. It appeared doubtful, on affidavits, whether the award was made previous or subsequent to a revocation of the submission. The court refused to stay proceedings, but left the defendant to plead the award. *Lowes v. Kermod*. 146

2. If, upon a reference of actions in this court, and award of a sum to be paid by each party, the party entitled to the larger sum sues in the court of *K. B.*, in order to make the defendant's set-off subject to the lien of his attorney for his costs, this court will not interfere to enforce the set-off, nor will they order the award to be delivered up. *Symonds v. Mills*. 526

3. The arbitrator, to whom an action on the case for a fraudulent representation of the circumstances of *A.* was referred, found that the defendant, knowing the object of the plaintiffs' inquiries, had omitted to state the material facts of the existence of debts due by *A.* to him, and of his holding *A.*'s warrant of attorney, and that therefore he did not give a fair representation of what he knew concerning *A.*'s credit; and that the defendant, although he did not mean to hold out any inducement to the plaintiffs to trust *A.*, thereby misled the plaintiffs, and created in them a false confidence in the circumstances of *A.* The arbitrator acquitted the defendant of all collusion with *A.*, and of all fraud at the time of making the representation, but feeling himself compelled by adjudged cases, which he mentioned, to decide that the knowledge of the falsehood of the thing asserted was in itself fraud and deceit, he awarded in favor of the plaintiffs. The court set aside the award, on the ground that the arbitrator had, on the face of it, acquitted

the defendant of fraud and deceit. *Ames and others v. Milward.* 637

4. By the terms of a reference to arbitration, the two arbitrators were to appoint an umpire before entering into consideration of the matters in difference, and to make their award before a certain day, or such time as they or any two of them should appoint. The arbitrators, before appointing an umpire, enlarged the time, and afterwards held a meeting, at which the parties attended: Held, that the parties being aware of these facts, and having afterwards attended, could not now make any objection on the ground of the enlargement of the time, having been made before the appointment of the umpire. *In the matter of Hick and others.* 694

5. Notice was given to one of the parties to attend at a meeting, for the purpose of taking instructions for an award, and at that meeting that party did not attend; but the other party attended, and was examined privately. On the evidence which he then gave, the amount he was to pay was decreased by the arbitrators: Held, that this private examination of the party in his own favor was incorrect, and that the award must therefore be set aside. 694

6. An action of ejectment was referred to arbitration, and the reference, which was confined to that action, stated, that if the arbitrator should award that the plaintiff had any cause of action, he should have costs, as in a court of law. The arbitrator, by his award, directed the defendant to deliver up the premises, and pay the costs of the action, and a sum of money to the plaintiff for the loss of rent during the time the defendant held possession. He also directed the parties to execute general mutual releases. On a motion for an attachment against the defendant for the sum awarded to the plaintiff, Held, that the award was in that respect good, although the arbitrator did not find in terms that the plaintiff had any cause of action; and also, that if the award were bad as to the direction of mutual releases, that would not vitiate the whole award. *Doe dem. Williams v. Richardson.* 697

B

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1. Goods were sent from *J. G.* in *London* to *M.* at *Sunderland*, accompanied with a letter expressing a hope that some of the articles would be approved of, and desiring to have those articles which were not approved of returned as speedily as possible. The letter contained an invoice, headed, "Mr. *M.* bought of *J. G.*," wherein the prices of the articles were set down, but not carried out. On the evening of the day of the arrival of this letter and these goods at *Sunderland*, the effects of *M.* were seized under a *fi. fa.*; and on the following morning his shop was shut by the sheriff, and never reopened. In an action of *trover* for these goods, brought by *J. G.* against the assignees of *M.*, who had been made bankrupt: Held, that the goods did not pass to the assignees under the stat. 21 Jac. 1. c. 19. s. 11. *Gibson v. Bray and another, Assignees of Markham, a bankrupt.* 76

2. The acceptor of a bill of exchange, which is drawn and accepted after the issuing of a commission of bankrupt, but before the commission is opened or appears in the *Gazette*, is not protected by the stat. 1 James 1., although he has not any knowledge of the bankruptcy or of the issuing of the commission, and pays the bill to a *bona fide* holder; for the statutes 46 G. 3., and 49 G. 3., declare the issuing of the commission to be sufficient notice of a prior act of bankruptcy. *Brooks, Assignee of Carbutt v. Sowerby and another.* 165

3. A prior commission of bankrupt, which has never been acted upon or superseded, not being in legal operation, does not invalidate a subsequent commission. Where such prior commission was produced for the purpose of proving notice of an act of bankruptcy: Held, that it was not necessary to show that nothing had been done under it; it is for the party raising the objection to prove the prior commission to be in legal operation. *Warner and another, Assignees of Pelloue, a bankrupt, v. Barber.* 176

4. *A.* and *B.* were partners. *A.* committed an act of bankruptcy, and afterwards, but before the bankruptcy of *B.*, the sheriff seized goods which had belonged to *A.* and *B.*, under an execution against them: Held, that the assignees of *A.* and *B.*, under a joint commission, could not, suing as such, recover *A.*'s share of the property therein. *Hogg and another, Assignees of Dixon and Heckman, bankrupts, v. Bridges and another.* 200

5. The plaintiff, a lessee, assigned his term to the defendant, who thereupon gave to the plaintiff a bond to indemnify him

against the rest and covenants in the lease. The bond was forfeited; the defendant afterwards became bankrupt, and the assignee accepted the lease: Held, that the plaintiff could recover on the bond, as he had not actually made any payment before the bankruptcy, and was therefore unable to prove under the commission; and as the court considered the stat. 49 G. 3. c. 121. s. 19, not to apply to collateral securities, or to an assignee, but to be confined to the case of a lessee. *Young v. Taylor.* 315

6. A lease of an under-tenant, by the assignees of a bankrupt, does not amount to an acceptance by them of the original lease. *Hill v. Dobie.* 325

7. If a sheriff legally take goods in execution, the proprietor whereof afterwards becomes a bankrupt, and the sheriff sells at one time, after the bankruptcy, enough to satisfy both that execution and also another execution, which, being delivered to him after the bankruptcy, is void, the bankrupt's assignees may recover in trover for such of the goods as were sold after the sheriff had raised money enough to satisfy the first execution. *Stead and others, Assignees of Moorhouse v. Gascoigne.* 527

8. To *assumpsit* for money paid, the defendant pleaded his bankruptcy and certificate, and that the plaintiff, before the issuing of the commission, was surety for the defendant's debt, and that the money paid was paid by the plaintiff as his surety, after the issuing of the commission, and before a final dividend. Replication, that the plaintiff, before issuing the commission, was surety to J. for the defendant, that the defendant should perform articles of agreement, by which an annual rent was to be paid by the defendant; that after his bankruptcy, rent became due by the defendant, and that the money was paid by the plaintiff as the defendant's surety, by reason of the defendant's nonpayment, and for the costs of an action by J. against the plaintiff as surety: Held, on demurrer, that the plaintiff was not surety for, or liable to a debt due at the time of issuing the commission; that he was therefore, not within the eighth section of the 49 G. 3. c. 121. *McDougal v. Paton.* 584

9. A bill of exchange, drawn by A. for 98*l.* 11*s.*, was dishonored, and duly protested. A. afterwards became bankrupt, and the interest on the bill amounted to 1*l.* 17*s.* at the time of the issuing of the commission: Held, that this interest could not be added to the principal so as to form a good and sufficient petitioning creditor's debt on which to found the commission of bankrupt against A. *In the matter of Sambrook Burgess.* 660

10. Two partners in trade left their shop,

stating their purpose to be to get some bills discounted, or to get some means to satisfy demands; and told their shopman, if any creditor called, to make some excuse. On the next day the shopman, without further authority, denied them, although at home, to a creditor, who had called on the preceding day, when they were also denied. No evidence of any attempt to get bills discounted was offered: Held, that the jury had rightly considered their intention in leaving the shop to be to delay creditors. *Deffe v. Desanges and another.* 671

11. Where a party was described in a commission of bankrupt as a dealer in a particular trade, and the evidence of dealing was in a different trade, the court allowed a new trial on the ground of surprise. *Hale v. Small and others.* 730

12. Held, that a payment of a debt to a bankrupt after the issuing of the commission, though made without actual knowledge of the commission, is not protected under the stat. 1 James 1. c. 15. s. 14, the issuing of the commission being considered of itself notice to all the world of a prior act of bankruptcy. *Brooker, Assignee of Carbutt, a bankrupt, v. Sowerby and another.* 783

BARON AND FEME.

And see FINES AND RECOVERIES. PRACTICE OF PASSING, 27. MARRIAGE. PRACTICE, 30.

Where, on the separation of husband and wife, the husband by deed absolutely transfers to trustees for the wife certain personal property, no longer to be liable to his interference; in an action against the husband for a debt subsequently contracted by the wife, the defendant must show that the trustees gave effect to the deed by taking possession. *Burrett v. Booty.* 343

BARRATRY.

See INSURANCE, 2.

BASTARDY BOND.

See PLEADING, 20.

BILL OF EXCHANGE.

And see BANKRUPTCY, 2. 9. MUTUAL CREDIT. PARTNERSHIP, 1. PLEADING, 17.

1. Trover will lie for bills of exchange indorsed to an agent of the plaintiffs or order for their account, and deposited with the defendants by such agent, as a security for past and future advances by the defendants to him. *Treuttel and Wurtz v. Barandon and another.* 100
2. The defendant drew a bill of exchange on A., which A. accepted, payable to the

order of *B.*, who indorsed it to the plaintiffs. On the dishonor of the bill, the plaintiffs brought their action against the defendant, the bill being then held by the plaintiffs as agents of *B.* A former bill had been drawn by the defendant on *C.*, which, at the time of its dishonor, was held by *D.*, who took it up, and, having struck out his indorsement, sent it to *E.* to be forwarded to *F.*, for the purpose of receiving the amount from the defendant. *F.* indorsed it, being then overdue to *B.*, for a valuable consideration. *B.* demanded payment from the defendant, who drew the bill in question, as a substitution for the former bill, and delivered it to *B.* Before this latter bill became due, *D.* gave the defendant notice not to pay it: Held, that this latter bill was the property of *D.*, and that the plaintiffs were not entitled to recover the amount of it from the defendant. *See and another v. Zagury.* 114

3. An instrument was drawn, payable to the drawer or his order at a particular place, without being addressed to any person by name, and was afterwards accepted by the person residing at the place where it was made payable: Held, that the acceptor was liable in an action upon such instrument as a bill of exchange. *Gray v. Milnor.* 739

BOND.

See PLEADING, 1. WARRANT OF ATTORNEY, 3. STAMP.

BREWERS.

See DEED.

BRIDGE.

See COVENANT, 5.

BROKER.

See DAMAGES. LIEN, 1. 4.

C.

CAPTURE.

See INSURANCE, 1. PRIZE.

CARRIER.

And see WAREHOUSEMAN.

In an action of *assumpsit* against a carrier, evidence to prove negligence is admissible, and a gross neglect will defeat the usual notice given by carriers for the purpose of limiting their responsibility. *Smith v. Horne and others.* 144

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CERTIFICATE.

See BANKRUPTCY, 8.

CHURCHWARDEN.

And see MONEY HAD AND RECEIVED.

A farmer furnished the produce of his land to the poor of the parish of which he was churchwarden, at a fair market price: Held, that he was liable to penalties, under the stat. 55 G. 3. c. 137. s. 6. *Pope v. Backhouse.* 239

CLERK OF THE PEACE.

See COVENANT, 5.

COMMISSION.

See PRIZE.

COMMISSION OF BANKRUPT.

See BANKRUPTCY, 2, 3, 4, 5, 8, 9, 11, 12

COMMISSIONERS.

See SEWERS.

CONSIDERATION.

See ANNUITY. ASSUMPSIT. FRAUDULENT ASSIGNMENT. GUARANTEE. INFANT. MONEY HAD AND RECEIVED, 3.

CONTEMPT.

See INSOLVENT DEBTOR.

CONTRACT.

See AUCTIONEER. PLEADING, 2. VENDOR AND VENDEE.

CONVEYANCE.

See CROWN GRANT.

COSTS.

And see AWARD, 5. INSOLVENT DEBTOR. PRACTICE, 4. 18. 28. 31. 34, 35.

1. *Assumpsit* on a promissory note drawn by *A.*, testator of defendant, payable to plaintiff *B.* Pleas, *non assumpsit*, *statute of Limitations*, and *plene administravit*. The two first issues were found for the plaintiffs; the last for the defendants. The prothonotary gave the plaintiffs costs on the whole and the *postea*; to the defendants he gave costs on the third plea only. On a motion that the prothonotary review his taxation, held, that the defendant having established an absolute bar, was entitled to the *postea* and the general costs; and that the prothonotary must review his taxation. *Ragg and Wife, executrix, v. Wells and Wife, executrix.* 129

2. Trespass against two defendants: one 2 N 2

suffered judgment by default, and a writ of inquiry was executed against him. The plaintiff entered a *nolle prosequi* as to the other, who, after a lapse of two years, was held to be entitled to costs, under the stat. 8 Eliz. c. 2. s. 2. *Jackson v. Lady Chambers and Ames.* 643

COVENANT.

And see *Lien*, 2. *Pleading*, 8. 10. 18. 21.

1. A term for years was limited to A, the plaintiff's testator, for securing a sum of money, and the defendant, in the mortgage deed, covenanted with A, his executors, administrators, and assigns, to pay the money at a certain day; after that day, A died, having bequeathed to the plaintiff the sum so secured, and appointed the plaintiff and another his executors. The coexecutor assented to the bequest. In an action on the covenant, brought by the plaintiff in his own right: Held, that he was not entitled to sue as assignee; first, because the covenant was merely personal; and, secondly, because the breach occurred in the testator's lifetime. *Canham v. Rust.* 227
2. If the interest of covenantees be several, they may maintain several actions, although the language of the covenant be that of a joint covenant. *James v. Emery and Cludde.* 245
3. Interest allowed on the affirmation of a judgment, in an action for breach of covenant for nonpayment of purchase money, on the whole sum recovered below, and from the date of the judgment below, notwithstanding an express agreement between the parties, that part only of the sum recovered should bear interest. 245
4. The assignor of a term covenanted that he had not at any time done any act whereby the premises assigned could be encumbered; and that, notwithstanding any such act, the lease was a good and subsisting lease, and that the defendant, at the same time of executing the assignment, had in himself good right to assign the premises in manner aforesaid: Held, that the covenant that the assignor had good right to assign, was qualified and restrained to his own acts only. *Foord v. Wilson.* 543
5. An act of Parliament empowered justices in quarter sessions assembled, or at any adjournment of the same, to build, or order to be built, a bridge, and enacted that they might contract for the building of the same; and that every contractor for such work should give sufficient security for the due performance of his contract to the clerk of the peace; and that the said justices at any general quarter session or adjournment of the same, might appoint such of the justices as they should think fit to superintend the building, &c. The expenses were to be provided for out of the county rate; and it was enacted that, in all actions or proceedings at law, the said justices might sue or be sued in the name of the clerk of the peace; and that no action should abate by the death of any such clerk, but that the clerk of the peace for the time being should always be deemed the plaintiff, &c., defendant, or respondent, in all such actions, &c., or proceedings at law respectively; and it was provided that every such clerk of the peace should be reimbursed all damages, &c., and expenses which he should have paid, or be subject or liable to on account thereof, out of the money to be raised by virtue of the act. The plaintiff covenanted with the defendants, who were the superintending justices, and were described in the indenture as the major part of the justices assembled at the general quarter sessions, to build the bridge; and the defendants covenanted, that they, or the treasurer for the county, should pay him a certain sum by instalments. The plaintiff having declared in covenant against the defendants for the nonpayment of two instalments: Held, that the defendants were not liable; and that the remedy given by the statute was against the clerk of the peace. *Allen v. Waldegrave.* 566
6. By charter party between the ship owner and freighters, the ship owner covenanted to take on board six pipes of brandy at *Havre*, and therewith proceed to *Terciera*, and there take on board a complete cargo of fruit or other goods, as the freighters might think fit, and proceed to *London* or *Bristol*, as might be ordered by the freighters, and there make a right and true delivery of the fruit, &c.; and the freighters covenanted to pay certain freight for the fruit and the brandy, the freight of brandy, &c. to be taken out, in fruit at *Terciera*, and guaranteed the ship a full cargo home: Held, that the covenant to take the brandy to *Terciera* was not a condition precedent, but a distinct and independent covenant. And therefore, the owner, in an action of covenant on the charter-party against the freighters for not putting a full cargo of fruit on board at *Terciera*, having averred general performance, the declaration was held good on demurrer. *Fothergill v. Walton and another.* 576
7. The assignee of an assignee of a lessee of a term for years may maintain an action upon a covenant for quiet enjoyment, entered into by the lessee with the first assignee and his assigns upon the assignment of the term to him. *Lewis v. Campbell.* 715

CROWN GRANT.

1. Held, that a reversion to the crown, expectant on the determination of an estate tail, granted by the crown to a subject for services, was not barred by either of two private acts of Parliament which had been passed for confirming a settlement of the estate made by the tenant in tail, which settlement purported to bar such reversion; both of those acts containing an express saving of the rights of the crown, but neither of them naming the crown in the body of the act; and the second act vesting part of the settled estate in trustees for sale, with directions to purchase other lands with the produce of such sale, to be settled, in lieu of the lands sold, to the same uses as expressed in the former act. *Mifford v. Elliott.* 1
2. It was also held, that the trustees could not pass a fee simple in the settled lands, which they had sold under the second act, in conformity to the powers therein given to them. 1

CHARTER-PARTY.

See COVENANT, 6. FREIGHT. LIXX, 2, 3. PLEADING, 10.

D.

DAMAGES.

- A. having a commission from B. to ship tobacco, employed C. as his broker, and directed him to buy *Porto Rico tobacco of the best quality*. C. bought tobacco and shipped it to B., and delivered his bought note to A., in which the tobacco was described as *Porto Rico tobacco* only. B. finding the tobacco to be very bad, refused to accept it, and brought an action against A. and recovered: Held, that an action lay by A. against C., and that A.'s acceptance of the bought note was not a waiver of his directions as to quality, and that the proper measure of damages was, not the mere difference in price between the two kinds of tobacco, but the amount of the damages and costs recovered in the action by B. against A. *Mainwaring v. Brandon and another.* 202

DEBT.

See BANKRUPTCY, 8. PLEADING, 1.

DEED.

And see CROWN GRANT.

- A condition in a deed of composition, that a publican shall continue to deal for twelve years with his creditors in the articles of their respective trades, may be valid. But it is qualified by the implied

condition, that their articles shall be good and marketable. Contracts by which brewers bind publicans to deal with them are not to be favored, as tending to prejudice the health of the subject. *Thornton and others v. Sherratt.* 529

DEPOSIT.

See AUCTIONER. BILL OF EXCHANGE, 1. MUTUAL CREDIT. PLEADING, 2. PRACTICE, 23.

DEPUTED MARINER.

See PRIZE.

DEVISE.

1. A. devised lands to G. H., the eldest son of J. H., for life; remainder to his issue; remainder to S. H., the second son of J. H., for life; remainder to his issue; remainder to J. H., the third son of J. H., for life; remainder to his issue; with divers remainders over. J. H. was the second son, and S. H. the third son of J. H.: Held, that S. H. became entitled on the death of G. H. without issue. *Doe on the joint demise of Le Chevalier and his Wife, and on his separate demise, v. Huthwaite and another.* 306
2. Real estate was devised to H. L. and her assigns for life, in case she should continue unmarried, and, after her decease unto such persons as she should appoint, and in default of appointment, then over to other persons; and the testator declared that, in case H. L. should marry in the lifetime of his wife with her consent, or after the death of his wife with the consent of two persons mentioned in his will, or the survivor of them, H. L. and her assigns should hold the same real estate in such manner as she should have done if she had continued unmarried. After the death as well of the testator's wife, as also of the two persons so mentioned in his will, and above twenty years since, H. L. married R. A., who also died in the lifetime of H. L.; Held, that the estate for life in H. L. was become absolute, and that she could then execute the power of appointment. *Aislabie v. Rice.* 459
3. Devise to B. F. for life: remainder to the second, third, fourth, and other sons of B. F., except the first or eldest son, in tail male successively; remainder to F. S. B. F. had no issue at the time of the decease of the testatrix, but afterwards had four sons, of whom the second and third were living at the same time, and the second and fourth were also living at the same time; but at the decease of B. F., the fourth son only was living: Held, that the remainder to the second and other sons of B. F., except the first or

eldest son was vested, upon *B. F.* having two sons living at the same time, and was not subject to be divested by subsequent events, and consequently that the fourth and only surviving son of *B. F.* took an estate tail under the devise. By four judges against two, *Graham B. and Wood B.* dissentient. *Driver on demise of Frank Frank, Esq., v. The Reverend Edward Frank.* 468

4. A will is revoked by a subsequent fine; and where a testator, by his will, devised his estates to his eldest son and his issue in tail, and afterwards by a codicil, (reciting that, since making his will, certain other estates had been devised by the brother of the testator to him for life, with remainder to his (the testator's) children and their issue,) revoked the devise of the estates mentioned in his will to his eldest son, and declared that a proviso contained in his will should be extended so as to comprehend the estates limited by the will of his brother, and to prevent the estates settled by the will of the testator from going with the estates limited by the will of his brother: It was held, that the codicil did not operate as a republication of his will, nor as a devise by implication or confirmation of the devise of the lands comprised in the will of the brother. *Parker and another v. Biscoe.* 699

DILAPIDATIONS.

In an action for dilapidations by a vicar against his predecessor, the plaintiff declared that the defendant was seised of the premises in question in right of his vicarage. The premises were copyhold, and were devised to the master and senior fellows of *Trinity college, Cambridge*, in trust, to permit the vicar for the time being to receive the rents and profits (the charges to the lord, and expenses for necessary reparations, being first deducted:) Held, that, as there was no seisin in the vicar, the plaintiff could not maintain this action. *Browne, clerk, v. Ramsden, D.D.* 559

DISTRESS.

And see LANDLORD AND TENANT.

1. *Replevin.* The defendant avowed the taking, as overseer of the poor, under stat. 43 *Eliz.* by virtue of a distress warrant for an aggregate sum due on seven several rates, six of which were confirmed on appeal, on the ground of the appellant not being in sufficient time, the other being then quashed by consent. It did not appear that any precise demand had been made previously to the issuing of the warrant. The jury found a verdict for the defendant for the aggregate

sum of the six rates, deducting the amount of the other. The court set aside this verdict, and directed a verdict for the plaintiff, holding that this case was to be distinguished from the case of a distress for rent, and that a precise demand was necessary previous to the issuing of the warrant of distress, contrary to the opinion of *Wood, B.*, before whom the cause was tried. *Hurrell v. Wink.* 369

2. *Hurrell* was rated to the poor of *R.* In the first rate, after the statement of the rental, the description was "late *Hurrell's*, now ——" and in the subsequent rates, "late *Samuel Hurrell*:" Held sufficient by *Wood B.*, at *Nisi Prius.* 369
3. Trees, shrubs, and plants, growing in a nursery ground, cannot be distrained for rent. *Clark and another v. Gaskarth.* 431
4. The word "product," in the 8th section of stat. 11 *G. 2. c. 19.*, applies only to such products of the land as are subject to the process of becoming ripe, and of being cut, gathered, made, and laid up, when ripe. 431
5. A landlord cannot distrain for rent-trees growing in a nursery ground. *Clark and another v. Calvert.* 742

DISTRINGAS.

And see PRACTICE, 30.

1. The court granted a *distringas* on affidavits, stating, that it was believed that the defendant absconded to avoid process, that repeated applications had been made at his house, and no satisfactory answer had ever been given to the inquiry as to the time of his coming home; and that, on learning that the business of the applicant was to serve the defendant with process, the persons at the house treated him with derision. *Watmore v. Bruce.* 57
2. The court refused a *distringas* on affidavit, stating that it was believed the defendant kept out of the way to avoid process; that the officer having applied thrice at the defendant's house, was told each time by the servants that their master was not at home, that he had been absent for months, and that he had not been at home since the officer called last. *Anonymous.* 171

E.

EJECTMENT.

And see AWARD, 5. LANDLORD AND TENANT, 1.

1. demised premises to *B.* for one year certain. It was agreed that, after the expiration of that year, the tenancy should expire, on three months notice being

given by *A.* The agreement contained no clause of re-entry. *B.* entered and took receipts for the rent from *A.*, first, in his own name alone, and, afterwards, in the names of himself and two others, who were his partners. After three years' possession, he received a notice to quit from *A.* alone: Held, that *A.* might recover on his own demise in an action of ejectment, the notice to quit from *A.* alone being sufficient to determine the tenancy. *Doe, on the Demise of Green and others, v. Baker.* 241

ERROR.

See WARRANT OF ATTORNEY, 2.

ESCAPE.

See PLEADING, 13.

EVIDENCE.

And see BANKRUPTCY, 3. CARRIER. PLEADING, 15. PROMISSORY NOTE, 1.

1. The defendant, a tradesman, was accustomed to employ his daughter to write his bills and letters. A customer, to whom a bill, written by the daughter, had been sent by the daughter, being advised by the plaintiff that the charge was too high, sent it back: it was returned to her, inclosed in a letter also written by the defendant's daughter, which constituted the libel: Held, that in an action for the libel this evidence was not sufficient to fix the defendant. Secondly, it was also held, that the daughter, in such case, could not be called as a witness to prove by whose direction the letter was written. *Harding v. Greening.* 42
2. In an action on a joint contract against several partners, one of the defendants having suffered judgment to go by default, is not admissible as a witness to prove the partnership of himself and the other defendants without their consent, although the proposed witness is released as to all other actions, save that on which he is called to give evidence. *Mant v. Mainwaring, Hill, and others.* 139
3. Proof of the owner's right to fish opposite his own land, *ad medium flum aque*, cannot be given under a plea of a common of fishery. *Bennett v. Costar.* 183
4. In an action on the common counts for work and labor, held, that the plaintiff, having established his case by other evidence was not precluded from recovering by the defendant's proving the existence of an unstamped and unsigned agreement, which fixed the price, and which the defendant did not give notice to the plaintiff to produce. *Stevens v. Piskey.* 327
5. In trover by the assignees of a bankrupt against the sheriff, for goods taken in

- execution by the latter; the declarations of the bankrupt, previous to his bankruptcy, having been admitted to show that the commission had been founded in a collusion between the bankrupt and the petitioning creditor, to create an apparent petitioning creditor's debt: Held, that the evidence was well received, though the petitioning creditor was not one of the assignees under the commission. By three Judges. (*Gibbs, C. J., absente.*) *Thompson and Barrat, Assignees of Smyth, a bankrupt, v. Bridges and another.* 336
6. The declaration in covenant on an indenture of apprenticeship averred that the deed was in the possession of the defendant, who pleaded *non est factum*. At the trial the deed was proved to be in the hands of the defendant, who had received notice to produce it, the notice stating the name of the subscribing witness. On nonproduction of the deed, the plaintiff gave parol evidence of its contents, without calling the subscribing witness, who was in court: Held, that the parol evidence was well received. *Cooke v. Tannwell.* 450
 7. Case for negligently driving a mail coach against the plaintiff's waggon horse, whereby it died: Held, that the plaintiff's waggoner was incompetent to prove the negligence of the defendant without a release from his master. *Morish v. Foote.* 454

EXECUTION.

And see BANKRUPTCY, 4. 7. FRAUDULENT ASSIGNMENT. LANDLORD AND TENANT. PRACTICE, 2. 29.

- A. assigned his effects to trustees for the benefit of his creditors. By the deed, the trustees were enabled to allow *A.* to remain in possession of any part of them until the remainder should be sold, and the debts collected. They sold a part of the goods by public sale, describing them as *A.*'s property, and suffered him to remain in possession of the remainder, on the security of which, *B.* knowing them to be the property of the trustees, gave credit to *A.* Execution afterwards issued at the suit of *B.*, and the goods were sold under a *feri facias*: Held, that the trustees might recover against the sheriff in an action of trespass, *B.* having had notice of the change of property, and the possession of *A.* being consistent with the deed. *Wooderman and another v. Baldock.* 676

EXECUTOR.

And see PLEADING, 5.

All sums stated by an executor in his inventory given into the Ecclesiastical Court as supposed to be recoverable, are

assets in his hands, unless he prove a demand and refusal. *Young v. Cawdrey and another.* 734

F.

FACTOR.

See ASSUMPSIT. BILLS OF EXCHANGE, 1, 2. BROKER.

FALSE IMPRISONMENT.

See TRESPASS.

FEME COVERTE.

See BARON AND FEME. FINES AND RECOVERIES, PRACTICE OF PASSING, 27.

FIERI FACIAS.

See BANKRUPTCY, 1.

FINE.

A fine of all the lands within a certain parish is sufficient to include a manor within that parish, although not mentioned by name. *Parker and another v. Biscoe.* 699

FINES AND RECOVERIES, PRACTICE OF PASSING.

1. Fine amended by insertion of a name not known to belong to the consor at the time of passing the fine. *Richard Sharp Spencer, consor.* 20
2. Recovery amended by inserting an omission in the name of the vouchee. *White, Demandant; Gregory, Tenant; Herne, Vouchee.* 27
3. Fine amended by increasing the number of acres, the measurements on which the description of the number of acres were founded being wrong. *Anonymous.* 74
4. The documents relating to a recovery of premises in *Northumberland* did not reach *London* till the first day after *Easter* term; the mistake was not discovered; the proceedings went on in the subsequent *Trinity* term, and the recovery came to the Cursitor's office in *Michaelmas* term following, when the court, upon motion, allowed the recovery to pass as of *Easter* term. *Anonymous.* 75
5. Fine more than a twelvemonth old allowed to pass without any special reason assigned. *Noakes v. Shipman.* 75
6. Recovery amended by altering the words, "in the parishes of *Childerditch* and *Brentwood* in the county of *Essex*," to the words "in the parishes of *Childerditch* and *Southweald* in the county of *Essex*;" on the affidavit of the vouchee, that he was seised in tail of the premises,

and directed his attorney to suffer a recovery of his lands in the parishes of *Childerditch* and *Brentwood*, of which he was seised in tail as aforesaid, but that it had since been discovered, that *Brentwood*, wherein a part of his lands was situate, was a hamlet in the parish of *Southweald*; and that he intended to suffer a recovery of so much of his lands as was since discovered to be within the parish of *Southweald*. All the parties living. *Copland, Demandant; Bigg, Tenant; Thompson and Wife, Vouchers.* 68

7. Affidavit of husband and wife, that they both did appear at the bar; the officer said that he had written the names of the husband and wife; but the name of the wife appeared struck out in the *præcipe*, an act which the officer said he never did. The fine being only of the last term, the court refused to amend the caption by inserting the wife's name, and ordered that she should come up to reacknowledge the fine. *King v. Steddel and Wife.* 87

8. A parish was situated in the contiguous counties of *S.* and *B.* The premises in this parish, intended to be passed by a fine, were situated in the county of *S.*, but were described as situated in the county of *B.* The court allowed the fine to be amended by substituting the county of *S.* for the county of *B.* *Stubbs v. Stevenson.* 87
9. In a recovery, the demandant died before the return of the writ of seisin; the acknowledgment was taken at the *Cape of Good Hope* on June 9, 1817, and the writ of *dedimus potestatem* was tested on the 16th January, 1817. The court refused an application to make the writ of entry returnable in one month of *Easter*, 1817, the writ of summons returnable in three weeks of the *Holy Trinity* following, to allow the tenant's appearance to be recorded as of *Trinity* term, 1817, and the recovery to pass as of that term. *Waller, Demandant; Hinde, Tenant; Bland, Vouchee.* 104
10. The court refused to make an order compelling the amendment of a recovery suffered by an insolvent debtor. *Sanderson, Demandant; Bessant, Tenant; Partridge, the elder, Vouchee.* 105
11. Recovery permitted to pass where the warrant of attorney did not state in what plea of land it was intended to operate, it being evident from the caption for what purpose the attorneys were appointed. *Alexander, Tenant; Palmer and others, Demandants; House and Mary Stacy, Vouchers.* 164
12. Recovery allowed to pass, where the warrant of attorney was "put in the place of *A. B.* in a plea of land," the words "to gain or lose" being omitted in the warrant of attorney. *Lees, De-*

- mandant; Randall, Tenant; Grimes and others, Vouches.* 164
3. The court will not direct its officer to pass a recovery where there is a mistake in the form of the warrant of attorney. *Baxter, Tenant; Bowker, Demandant; Swinfen, Vouches.* 167
14. Nor will it permit the same mistake to be rectified by amending the warrant of attorney. 167
15. Recovery amended by deed to lead the uses, by inserting the name of the parish of A., where the recovery was of lands in the parishes of B. and C., or any adjoining town, A. being contiguous to B. and C. *Baxter, Demandant; Baxter, Tenant; Hawkins and Browne, Vouches.* 191
16. Return day of the writ in a recovery, returnable in the last term amended, and the recovery allowed to pass, as of the present term. *Bruin, Demandant; Blizard, Tenant; Miller, Vouches.* 197
17. Præcipe directed to the vouches, amended by inserting the name of the tenant. *Dawson, Demandant; Stocker, Tenant; Brooke, Vouches.* 226
18. Recovery amended by inserting an alias name, where the names in the deed and the recovery differed. *Scilly, Demandant; Smith, Tenant; Barnard, Vouches.* 244
19. Recovery amended by adding the name of a parish (the name having been improperly spelled,) on affidavit that the vouches was seised of land in the parish proposed to be substituted, and that it was intended to suffer a recovery of all the vouches's lands in the county in which the proposed parish was situate; but the court would not allow the name originally inserted to be expunged, as the affidavit did not state that there was no such parish, or that the vouches had no lands in such parish. *Sikes, Demandant; Knowles, Tenant; Lord Galway, Vouches.* 262
20. A recovery of 1729, amended by adding premises which were comprised in the deed to lead the uses, but for which the king's silver had not been paid. *White, Demandant; Bicknell, Tenant; Papillon, Vouches.* 303
21. Recovery amended by substituting the words "advowson of the church" for the word "rectory." *Coore, Demandant; Sprags, Tenant; Blackburn and Wife, Vouches.* 333
22. The court refused to pass a fine where the Christian name of one of the parties was written on an erasure in the acknowledgment which was taken abroad, there being no affidavit describing in what stage of the proceeding the alteration was made. *G. Douglass and Ann his Wife, Conusors.* 334
23. Fine amended by inserting the words "one-fourth part," in conformity with the dedimus and deed to lead the uses. *Wilmot, Bart, Plaintiff; Joseph Clarke and Elizabeth his Wife, Deforciant.* 335
24. Fine, the date of which was not sworn to, but which had been rejected by the officers as out of time, suffered to pass on affidavit that, after the due taking of the acknowledgments, the papers had been laid aside and forgotten in the office of the attorney, one of the deforciant, and that all the parties were alive. *Lidbetter, Plaintiff; Barton and Wife and others, Deforciant.* 438
25. Fine, of Trinity term, 1814, not suffered to pass, all the parties being alive, there being no affidavit stating that the papers were mislaid, or assigning other reason for the delay. *Inglis, Plaintiff; Heald, Deforciant.* 442
26. Demandant's name changed in a recovery, without affidavit of intention or identity of the party or premises. *Bird, Demandant; Quiller, Tenant; Tindal, Vouches.* 556
27. A rent charge, payable to a feme covert for her life, was sold for a valuable consideration by herself and her husband, who received the purchase money, and both executed a deed of conveyance. The husband was separated from the wife, who was ignorant where he was to be found, although she had made diligent search for him. On application that the wife might be allowed to levy a fine of the rent charge without her husband, the court refused to interfere. *Ex parte St. George.* 590
28. The court will not alter that which is the deed of the party. Therefore, where the vouches in a recovery had signed his name to the deed to make a tenant to the præcipe, the court refused to amend by allowing the insertion of an additional baptismal name. *Shaw, Demandant; Spence, Tenant; Hunt, Vouches.* 645
29. The court will not amend a recovery by adding to the description where the description is already sufficient to pass the lands. *Howman, Demandant; Orchard, Tenant; Barney, Vouches.* 683
30. Fine amended by substituting the name of a parish written on an erasure in the deed to lead the uses, for the name of another parish, on an affidavit stating that it was by mistake, and that the substituted name had been written on the erasure in the deed previous to its execution. *Clennell, Plaintiff; Storer, Deforciant.* 692

FIRE.

See WAREHOUSEMAN.

FISHERY.

See EVIDENCE, 3. PLEADING, 7. PRACTICE, 11.

FRAUD AND DECEIT.

See AWARD, 3. FRAUDULENT ASSIGNMENT.

FRAUDS (STATUTE OF.)

See GUARANTEE, 2.

FRAUDULENT ASSIGNMENT.

And see EXECUTION.

A., for good consideration, assigned his interest in a farm, and his cattle and implements of husbandry, then in the possession of the sheriff, under a writ of *feri facias* at the suit of C., and the property was liberated by the sheriff on his taking security from B. B., after the assignment, managed the property, but A. continued in possession. On the property being afterwards taken in execution at the suit of D.: Held, that it was protected by the assignment to B. *Jezeeph v. Ingram* 838

FREIGHT.

And see INSURANCE, 3. LIEN, 2, 3. PLEADING, 10.

1. A ship freighted with timber, &c. by the agents of the defendants at *Danzic*, and consigned to their house in *London*, was, on her arrival, and after part of the cargo had been delivered, seized by the revenue officers on suspicion that she was not *Prussian* built. The Treasury, on petition, ordered the ship to be restored, on condition that the cargo should be exported, and on payment of a sum as a satisfaction to the seizing officers. This sum the master (plaintiff) paid, and the defendants accepted and exported the cargo: Held, that this conduct of the master sufficiently showed the voyage to be illegal, and that he had admitted such illegality so as to preclude him from recovering the freight. *Black v. Solly and another.* 89

2. P. was the owner of a ship which took in a cargo at *Calcutta*, to be carried thence to *St. Petersburg*, where P. resided. This cargo was purchased on account of P. by E., his supercargo and agent, but the house of F. F. and Co. of *Calcutta*, advanced 26,000*l.* towards the purchase thereof and of the cargo of another ship belonging to P., and, for their security, bills of lading of the first mentioned cargo were signed by the captain, as shipped by F. F. and Co. on account of P., to be delivered at *St. Petersburg*, to the order of F. F. and Co., or their assigns. The words, "he or they paying freight," which, in the bills of lading, immediately followed the direction for delivering to the order of F. F. and Co. were struck out. These bills were delivered to F. F. and Co., and indorsed and

transmitted by them to the defendants, their correspondents in *London*. Before the ship sailed from *Calcutta*, a memorandum for charter was entered into between E. and the captain whereby it was agreed that the ship should be despatched with a complete cargo, should proceed to *St. Petersburg*, and there deliver the same to the order of the freighter on payment of freight at a specified rate. The ship, in the course of her voyage, was lost, but there was a salvage of part of the cargo, which was sold with the assent of the captain, and produced the net sum of 13,300*l.* In *April*, 1816, the defendants, as holders of the bills of lading, applied for the proceeds of the salvage, but the plaintiffs had put a stop thereon on the part of P., and the captain, as agent of P., claimed a lien thereupon for *pro rata* freight. On the 12th of *July*, 1816, the memorandum for charter not being then forthcoming, and the defendants being then in possession of the bills of lading, by letter to the plaintiffs, agreed that (in consideration of the plaintiffs handing to the defendants the captain's order in the defendants' favor for the proceeds of the cargo of his late ship, and a letter from the plaintiffs to those who had sold the cargo, withdrawing any claim on account of P.,) the defendants would hold themselves accountable for the plaintiffs, as the agents of P., for whatever might appear to be due for the *pro rata* freight, according to the charter party entered into at *Calcutta* between E. and the captain. The plaintiffs performed their part of the agreement, and the defendants, in consequence, received the proceeds of the salvage, but refuse to pay the *pro rata* freight: Held, that the plaintiffs were entitled to recover in *assumpsit* on the agreement of *July*, 1816, the amount of *pro rata* freight. *Thornton and others v. Fairlie, Bonham, and others.* 354

G.

GENERAL BALANCE.

See LIEN, 1. MUTUAL CREDIT.

GRANT.

See CROWN GRANT.

GAURANTEE.

1. The plaintiffs declared that, in consideration that they would lend to S. and Co. 5000*l.*, the defendant promised to be answerable for the same; that they did lend the said sum, whereby the defendant became liable. The form of the guarantee was, that the defendant would

be answerable to the extent of 5000*l.* for the use of the house of S. and Co. At the time this was given, S. and Co. were indebted to the plaintiffs in a considerable sum of money, for which the plaintiffs held a promissory note, drawn by S. and Co., and other bills, as a security. On receiving the guarantee, the plaintiffs cancelled the note, and delivered up the bills which they held. S. and Co. then delivered those bills back again to the plaintiffs, together with a new promissory note, but no money passed: Held, that the guarantee only contemplated future loans, and that the transaction did not amount to a loan of money so as to charge the defendant. *Glyn, Bart., and others, v. Hertel.* 208

2. The plaintiff having shipped goods to R. S., refused to deliver the bill of lading to him without a guarantee, upon which the defendant enclosed a bill, accepted by R. S., in a letter to the defendant, in which he stated that R. S., having accepted the bill, he gave his guarantee for the due payment of it in case it should be dishonored: Held, that the consideration was sufficiently expressed upon the guarantee. *Boehm v. Campbell.* 679

H.

HABEAS CORPUS.

See PLEADING, 13. PRACTICE, 7.

HORSES.

See POST-HORSE DUTY.

I.

INFANT.

And see PARTNERSHIP, 1.

If an infant pays money with his own hands without a valuable consideration, he cannot get it back again. Therefore, where an infant paid money to A. as a premium for a lease, and enjoyed the same for a short period during his infancy, but avoided it after he became of age, and quitted the premises: Held, that he could not recover the sum so paid, in an action against A. for money had and received. *Holmes v. Blogg.* 508

INSOLVENT DEBTOR.

And see FINES AND RECOVERIES, PRACTICE OF PASSING, 10.

1. A prisoner, under an attachment for contempt for nonpayment of costs pursuant to an award, may be brought up at VOL. IV.—55

the suit of the prosecutor, in order to make him deliver in a schedule of his effects, under the compulsory clause in stat. 32 G. 2. c. 28. The court considered the 33 G. 3. c. 5., as incorporated with the 32 G. 2. *The King v. Curwen, a prisoner.* 57

2. The stat. 16 G. 2. c. 17., for the relief of insolvent debtors, (after enacting that the estate of the insolvent should vest in the clerk of the peace, who should, under certain restrictions, appoint an assignee or assignees for the benefit of creditors,) directed such assignee or assignees to render such overplus, if any should be, (their own debts and charges first deducted,) to the prisoner, his executors or administrators; and also provided, that it should be lawful for the judges of the courts of K. B., C. P., and Exchequer, or any two of them, from time to time, upon the petition of any creditor of such prisoner, complaining of any fraud, mismanagement, or other misbehavior of all or any of the assignees, upon hearing the parties concerned, to give such directions therein, either for the removal of such assignee or assignees, and the appointing any new assignee or assignees in their places, or for the prudent, just, or equitable management, or distribution of the estate and effects for the benefit of the respective creditors, as the said courts or judges respectively should think fit; and, in the case of such removal and appointment of a new assignee or assignees, the act directed that the insolvent's estate should be divested out of such removed assignee or assignees, and should be vested in and delivered over to the new assignee or assignees in the same manner, and for the same ends and purposes as the same were before vested in the original assignee or assignees. Under this act an assignee was appointed to dispose of the estate and effects of an insolvent, who took the benefit of the act in the year wherein it was passed. This assignee was removed, and another appointed, under a rule of court of C. P.; and a succession of removals and new appointments took place under C. P. rules, until in 1779, A. was made assignee of the insolvent's estates under a rule of court of C. P., obtained possession of the insolvent's estate, disposed of some parts of it, and died without distributing the same, or giving any account thereof, leaving B., his heir and representative, him surviving. The personal representative of the insolvent (who had been dead for some years) applied to this court for a rule, calling on B. to show cause why a new assignee should not be appointed; and why an account should not be taken before the prothonotary of all sums of

money received by *A.* in his lifetime, or by *B.* since *A.*'s decease, belonging to the insolvent's estate. The court rejected the application on account of the unreasonable length of time which had been suffered to elapse before it was made. *Ex parte Heathfield, in the matter of Treville Cross.* 403

INSURANCE.

And see *Lien*.

1. The defendant *B.*, with other underwriters, subscribed, in *August*, 1814, a policy on hides. The ship was captured, and the plaintiffs abandoned to the underwriters, and claimed a total loss. Shortly afterwards, the ship was recaptured, and all the underwriters, in *October*, 1814, adjusted a salvage loss, deducting short interest, to 64*l.* 18*s.* 3*d.* per cent., save the defendant, who, in *February*, 1815, indorsed on the policy as follows: "Adjusted 33*l.* per cent. on account, upon my subscription to this policy, until the account of the proceeds of the goods insured can be made up, when a final loss is to be paid to the same amount as by the other underwriters; and, if the same exceed 33*l.* per cent., Mr. *B.* to pay the excess; if short, Mr. *H.* (the insured) to return the difference." Held, in *assumpsit* on this policy, that this was a conditional, not an absolute adjustment; and that the plaintiffs, not having proved their compliance with the conditions, were not entitled to recover. *Gannon v. Beverley.* 119
2. The captain of a vessel in due course of his voyage, put into port for the purpose of repairing damage, and while the repairs were proceeding was absent, and continued absent for a much longer time than was necessary to finish the repairs; and, during his absence, procured forged papers. He afterwards returned to the vessel, and instead of proceeding on the voyage, carried the vessel to a foreign port. On the trial of the cause the jury found that the act of barratry was committed during the absence of the captain, while the vessel was repairing: Held, that the verdict was right. *Roscoe v. Corson.* 684
3. An insurance was effected on the freight of a ship, and on the cargo from *Quebec* to *London*. The ship sailed from *Quebec*, and on her voyage sprung a leak, and in that state was run aground on a reef of rocks, and was in imminent danger of being carried away and destroyed. The captain, by the advice of a surveyor and of an agent for the owners, who was also a part owner himself, sold the vessel whilst in this dangerous situation. The ship was afterwards saved by the purchasers, and repaired, and brought a

cargo to *London*. The jury found that in effecting the sale, the master had acted fairly for the benefit of all concerned. In an action by the assured against the underwriters on freight for a total loss, it was held, that the captain was justified in making such sale, and that an abandonment of the freight was not necessary. *Idle and others v. The Royal Exchange Assurance Company.* 755

INTEREST.

And see *Auctioneer*. *Bankruptcy*, 9.
Covenant, 3.

Interest allowed, on affirmation of a judgment, for the balance due from a banker on account of money deposited with him (it being the custom of the bank to allow interest,) but at the rate only which the bank were accustomed to allow. *Itin v. Bradley.* 250

INTERLINEATION.

See *Warrant of Attorney*, 3.

J.

JUDGE'S ORDER.

See *Practice*, 25.

JURORS.

See *Practice*, 1.

JUSTICE OF THE PEACE.

See *Covenant*, 4.

L.

LABORERS (STATUTE OF.)

See *Replevin*.

LANDLORD AND TENANT.

And see *Award*, 5. *Bankruptcy*, 6. *Covenant*, 1. 4. 7. *Distress*, 3, 4, 5. *Ejectment*. *Pleading*, 18.

1. After verdict in ejectment against a tenant for not quitting pursuant to notice, a subsequent distress by the landlord, for rent due after the verdict, does not waive the notice to quit. Nor is it any ground for setting aside the verdict, or staying execution. *Doe on demise of Holmes v. Darby, clerk.* 538
2. The lessee of two farms agreed with *A.* that he should have them during the leases for the same, *A.* to remain tenant to the lessee during the leases; and at

the leaving of the farms *A.* was to be paid for the fallows and dung. *A.* took possession, and paid one year's rent growing due after the date of the agreement to the lessee, who afterwards distrained for rent in arrear: Held, that this distress could not be supported, as the agreement operated as an absolute assignment of all the lessee's interest in the farms. *Parmenter v. Webber.* 593

LEASE.

See BANKRUPTCY, 5, 6. LANDLORD AND TENANT, 2.

LEAVE AND LICENCE.

See PLEADING, 1. 18.

LIBEL.

See EVIDENCE, 1.

LIEN.

And see AWARD, 2.

1. The plaintiff, resident abroad, ordered *A.*, his correspondent here, to effect an insurance on his account. *A.* was in the habit of employing the defendant as his broker, to effect insurances on his own account and for his correspondents abroad, and instructed him to effect this insurance, but did not mention the plaintiff's name. The plaintiff paid the amount of the premiums, 280*l.*, to *A.*; but that fact was not known to the defendant at the time of effecting the insurance. *A.* was indebted to the defendant in 21,000*l.*, including the amount of the premiums, and in the course of the next year paid the defendant 33,000*l.*, but incurred further debts, so as always, throughout the year, to leave a balance in favor of the defendant to a greater amount than the sum due for the premiums. The defendant received 385*l.* from the underwriters, on the loss, and passed the same to *A.*'s account: Held, that the defendant had no general lien, and that the particular lien was discharged, as the defendant must be considered as having been paid the amount of the premiums. If a broker having a lien on a policy part with it, his lien revives on repossession. *Levy v. Bernard.* 149
- 2 The defendant, as owner of a vessel, covenanted by charter party with *A.*, as freighter to take on board a cargo in the *Brazil*, and deliver the same in *England*. *A.* covenanted to put the cargo on board, and pay freight at a certain rate per ton; part in money on the arrival of the vessel, and the remainder by bills at two months after the delivery of the cargo. The owner bound the vessel and her freight, and the freighter bound the cargo, for the due performance of their respective covenants. Part of the cargo

was shipped for *A.*, and part for other consignees. The defendant delivered the goods to the other consignees, on payment of the freight, at a less rate than that contracted for by the charter party; but refused to deliver to the plaintiffs the goods consigned to *A.*, which he had assigned to them, without their paying the whole of the freight due under the terms of the charter party: Held, that the defendant was justified in detaining the goods of the plaintiffs until payment of the freight stipulated for by the charter party, as the delivery of the goods and the payment of the freight were to be considered as concomitant acts. *Tate and others v. Meek.* 280

3. The owner of a vessel covenanted by charter party to let the vessel on freight, and to deliver the cargo in good condition; and the freighters covenanted to pay the freight on delivery of the cargo, part in money, and the remainder by bills at four months: Held, that the owner might detain the cargo until payment of the freight, the delivery of the cargo and payment of the freight being concomitant acts. *Yates and others, Assignees, &c. of Ashton and others, bankrupts, v. Railton,* 293. And see *Yates v. Meynell.* 302
4. The defendants, on the 15th October, as brokers of *M.*, purchased, by his advice, and on his account, goods of *D.* and Co., and agreed with them that the goods should remain on the premises of the latter for one month rent free; and that *M.*, after that time, should pay for the room they should occupy, until their removal. The invoice was made out to *M.* From the 7th to the 11th November the defendants shipped part of the goods by order of *M.*, who directed that the residue should be left on the premises of *D.* and Co. till further orders from him. The defendants soon afterwards were requested by *D.* and Co. to remove the residue of the goods, but the defendant did not then comply with that request. A docket was struck against *M.* on the 6th December; and on the 9th and 10th of that month the defendants, without any order from *M.*, removed part of the residue to their own premises. On the 10th a commission of bankrupt issued against *M.*: the court held that the defendants had no possession on which to found their claim, as brokers, to a lien on the goods so purchased. *Taylor, Assignee of M. Michael, a bankrupt, v. Robinson and another.* 648

M

MANOR.

See FINE.

MARRIAGE.

A marriage between two *British* subjects solemnized by a Catholic priest at *Madras* according to the rites of the Catholic church, followed by cohabitation, but without the licence of the governor, which it had been uniformly the custom to obtain, is valid. *Latour v. Teesdale*.

830

MASTER AND SERVANT.

See EVIDENCE, 7.

MEMORANDA.

Pages, 133. 523. 526. 669. 803.

MONEY COUNTS.

And see PRACTICE, 24.

An action cannot be supported upon the common money counts against one of the makers of a promissory note, who signed it as a surety only for the other maker. *Wells v. Girling*.

737

MONEY HAD AND RECEIVED.

And see INFANT.

1. An action for money had and received cannot be maintained against a churchwarden to recover back dues, which, previous to the commencement of the action, had been paid over to the treasurer of the trustees of a chapel. *Horsfall v. Handley*.
2. The trustees under a marriage settlement of stock, the dividends of which they covenanted to permit the bankrupt to receive for his life, executed, after his bankruptcy, a power of attorney to *A.* to receive the same. *A.* received the dividends, and paid them over to the wife of the bankrupt, save one sum, which he paid to one of the trustees: Held, that the assignees might recover the amount of such dividends from the trustees, in an action for money had and received. *Allen, Assignee of Prior, a bankrupt, v. Impett and another*.
3. The plaintiff executed an indenture of apprenticeship, (to which was appended a printed notice for the insertion of the premium, &c. under stat. 5 G. 3. c. 46,) by which she bound her son apprentice to the defendant, and she paid a premium. The indenture did not contain any statement respecting the premium, and was not stamped. The indenture being void for want of such statement, and not having been stamped within time: Held, that the plaintiff was not an innocent party, and that she could not recover the apprentice fee from the defendant, though paid without consideration, the indenture being void. *Stokes, Widow v. Twitcheu*.

492

4. The plaintiff assigned his ship to the defendant as a security for the repayment of money; but on the register it appeared to be an absolute assignment. The defendant sold the ship, and told the plaintiff that he had received the purchase money, and would account with him for the balance of the proceeds of the sale. In an action upon the money counts, the court held, that the plaintiff was entitled to recover this balance, the acknowledgment being sufficient to support the action. *Proutyng v. Hammond*.

688

MONEY PAID.

And see INFANT. WAREHOUSEMAN.

1. The defendant contracted to transfer stock on a certain day to the plaintiff, but failed to perform his contract; upon which the plaintiff bought the stock, and to recover the consequent loss sustained by him, brought an action against the defendant for money paid: Held, that such action was not maintainable, as the plaintiff should have declared specially on the contract. *Lightfoot v. Creed*.
2. *A.* mortgaged an estate, his sole property, to *C.*, by an indenture in which *B.* joined *A.* in charging an estate, their joint property, as a further security; and *A.* and *B.* gave their joint bond for payment of the sum advanced. *A.* afterwards, by deed, to which *B.* was no party, sold the estate, his sole property, to *D.*, who covenanted with *A.* to pay *C.* the sum advanced on mortgage to *A.*, and to indemnify *A.* and *B.* from the payment of it. *B.* was called on by *C.* for payment of the principal and interest of the money lent on mortgage, which *B.* accordingly paid: Held, that *B.* was not entitled to recover this sum from *D.* in an action against him for money paid to his use. *Richard Crafts v. Triton*.

365

MUTUAL CREDIT.

And see SPECIFIC APPROPRIATION.

1. *A.*, previous to his bankruptcy, deposited a bill of exchange with *B.*, for the specific purpose of raising money thereon, and *B.* advanced money on the bill: Held, that the assignees of *A.* were entitled to recover from *B.* the amount of the bill in an action of trover, they having tendered to *B.* the money advanced by him, though a general balance remained due from the bankrupt to *B.*; and that this did not form a case of mutual credit within the stat. 5 G. 2. c. 20. *Key and others, Assignees of Robinson and another, v. Flint*.
2. *A.* drew a bill on *B.* for 400*l.*, which *B.*, who was not then indebted to *A.*, accepted. *B.* afterwards became indebted to *A.* in 236*l.* 1*s.* 3*d.*, and then drew on

him for 163*l*. 8*s*. 9*d*., the balance of the 400*l*., and his last bill was sold to C. for its full value, to be paid for on a certain day. On that day B. committed an act of bankruptcy, and requested C. to keep the bill at the disposal of A. till B. had paid the bill for 400*l*., as he was not entitled to the money until the bill for 400*l*. was paid. Three days after the bankruptcy, A., ignorant of that fact, accepted the bill, and afterwards paid the money to C. on an agreement that he should resist any claim of the assignees. The bill for 400*l*. at this time remained over due and unpaid in the hands of A.; and B. was indebted to him in more than the amount of the bill in question: Held, that the assignees of B. could not recover against C., he being in the same situation as A., who had a larger claim against the estate of B., this being considered a case of mutual credit between A. and the bankrupts. *Sheldon and others, Assignees of the estate and effects of De Roche and others, v. Rothschild.* 156

3. Trover for cloths deposited by the bankrupt previously to his bankruptcy with the defendant, a fuller, for the purpose of being dressed: Held, that the defendant was not entitled to detain them for his general balance for such work done by him for the bankrupt previously to his bankruptcy; for that there was no mutual credit within stat. 5 G. 2. c. 30. s. 38. *Rose and others, Assignees of Smart v. Hart.* 499

N.

NAVIGABLE STREAM.

See *SEWERS*.

NE EXEAT REGNO, WRIT OF.

On the dissolution of partnership between B. and C., C. filed his bill in equity against B. for an account. A. admitted that he owed a balance to the house of B. and C., and was made a defendant in the suit in equity. C. applied to the court of Chancery for a writ of *ne exeat regno* against A. for a much larger sum than that admitted, alleging that to be the balance due to the house of B. and C. The court granted the writ for the smaller sum only; and A. was, accordingly, held to bail for the smaller sum, which he paid into court. B. became bankrupt. The assignees of B. C. being one of them, arrested A. for the larger sum. The court of C. P. refused to discharge A. out of custody, on the ground that this case did not come within the principle *nemo debet bis vexari pro eadem causa.*

Musgrave and others, Assignees of Moses Medex v. Isaac Medex. 24

NEGLIGENCE..

See *CARRIER*.

NEW TRIAL.

See *PRACTICE*, 13.

NOTICE.

And see *BANKRUPTCY*, 2, 3. 12. *PRACTICE*, 15. 24, 25, 26.

NOTICE TO PRODUCE.

See *EVIDENCE*, 6.

NOTICE TO QUIT.

See *EJECTMENT. LANDLORD AND TENANT*, 1.

O.

OUTLAWRY.

See *PRACTICE*, 12. 16. 22.

OVERSEERS.

See *PLEADING*, 20.

P.

PARISH.

See *PLEADING*, 16.

PARTNERSHIP.

And see *BANKRUPTCY*, 4. *EVIDENCE*, 2. *NE EXEAT REGNO, WRIT OF.*

Plaintiff, an infant, entered into partnership with an adult. The partners took a lease of premises from the defendant, for the purpose of carrying on their trade; the premium for which lease was paid for, half by the infant in cash, and the other half by bills drawn by the defendant and accepted by the plaintiff, in the joint names of himself and partner. The infant, the day after he became of age, dissolved the partnership; and four months after such dissolution, the defendant sued the adult partner alone on one of the bills, accepted a surrender of the lease from him, abandoned his action, and destroyed the other bills: Held, that these facts ought to have been left to the jury to determine whether the defendant had not dispensed with formal notice and disaffirmance of the contract, and that the plaintiff had been improperly nonsuited. *Holmes v. Blogg.* 35

PATENT.

A patent had been obtained for "the invention of certain improvements in the smelting and working of iron;" and the patentee, in his specification, declared, that his improvements consisted in certain processes thereafter set forth, by which the iron contained in slags or cinders, produced from the several furnaces, was, by smelting, brought into the state of bar iron, (whether all the sorts of the said slags, or any of them, were mixed together and used, or whether all the sorts of the said slags, or any one or more of them, were compounded with iron stones or iron ores, or with both of them; whether all the said several compounds were used together, or whether only one or more of them were used,) and further, in the use and application of lime to iron subsequently to the operation of the blast furnace, whereby that quality in iron called "cold short" was prevented. The patentee then declared, that in the smelting he used a mixture of lime and mine rubbish, and stated their proportions, and also the various processes, compounds, and proportions used in the different furnaces in the smelting and working; and further declared that he had discovered that the addition of lime or limestone, or other substances consisting chiefly of lime, and free, or nearly free, from any ingredient known to be hurtful to the quality of iron, would sufficiently prevent or remedy that quality in iron called *cold short*, and would render such iron more tough when cold.

On the trial of an action for the infringement of this patent, it appeared that iron had before been extracted from slags, that it had been previously discovered, and even published, that the application of lime would prevent the quality called *cold short*, that such application had been used for that purpose in an extensive iron work for a series of years previous to the date of the patent; and that the defendants had not worked according to the processes, compounds, and proportions described in the specification, for that they frequently varied the proportions, and, in one instance, omitted one of the ingredients altogether, with an equally successful result: Held, by three judges, *Gibbs, C. J., absente*, that there had been no infringement, and that the patent was void, the invention claimed not being new. *Hill v. Thompson and Forman.* 375

PAYMENT.

See BANKRUPTCY, 12.

PETITIONING CREDITOR'S DEBT.

See BANKRUPTCY, 9.

PLEADING.

And see AWARD, 5. BANKRUPTCY. BILL OF EXCHANGE, 1. COVENANT, 5, 6. DILAPIDATIONS. MONEY HAD AND RECEIVED. MONEY PAID. PRACTICE, 3. TRESPASS, 2. WARRANT OF ATTORNEY, 2. WORK AND LABOR.

1. To debt on bond conditioned, that the defendant should not open a shop within a certain distance of premises demised to him by the plaintiff, the defendant pleaded the leave and licence of the plaintiff: Held, that such plea was bad, on general demurrer. *Sellers v. Bickford.* 31
2. The defendant purchased a lease hold estate of the plaintiffs at a public auction, subject to certain conditions of sale, which were, "that the purchaser should immediately pay down a deposit in part of the purchase money, and sign an agreement for payment of the remainder within twenty-eight days from the day of sale, when possession should be given of the part in hand; and that the purchaser should have proper conveyances and assignments of the leases, without requiring the lessor's title, on payment of the remainder of the purchase money." *Assumpsit* was brought by the vendor against the purchaser for the nonperformance of the conditions on his part. After a verdict for the plaintiffs, on a motion of arrest of judgment, on the ground that the plaintiffs had not set out their title or tendered the conveyances to the defendant, it was held, that the plaintiffs were not bound to set out their title; and that allegations, that they were ready and willing to convey, and that they were ready and willing, and actually offered to convey, were equivalent to a performance of the conditions on their parts. *Ferry and another v. Williams.* 62
3. The plaintiffs declared that they agreed to sell, and that the defendants agreed to buy certain goods and merchandises, *to wit*: 328 chests and 30 half chests of oranges and lemons, at and for a certain specified price, also laid under a *videlicet*. The contract proved was for 308 chests and 30 half chests of *China* oranges, and 20 chests of lemons, without specifying price: Held, that there was no variance, the price and quantity being laid under a *videlicet*. *Crispin and another v. Williamson.* 107
4. A. and B. being assignees under one commission of bankruptcy, and C. being assignee under two other commissions, cannot sue jointly; but the declaration should state what their respective interests are. *Ray and others, Assignees of Brown and others, bankrupts, v. Davis and others.* 134
5. In avowing, as executor or administra-

- tor under the stat. of 32 Hen. 8. c. 37. s. 1., it is not necessary for the defendant to state for what term the tenant held the premises. *Quære*, whether the statute 32 Hen. 8. c. 37., applies to rents arising out of terms for years? *Meriton v. Gilbee.* 169
6. In an action on a recognizance of bail, taken before a commissioner in the country, the venue was laid in *Middlesex*, and the declaration stated that the defendant of *A.*, in the county of *B.*, came before *C.*, then and there being a commissioner, &c., for *B.*, and then and there before such commissioner became bail: Held, that this was a sufficient averment that bail was taken in *B.*, so as to give *C.* authority to take it; that such averment being made without a venue, yet the county in the margin would help; and that the action might be well brought in *Middlesex*, where the recognizance was filed. *Hartley v. Hodgson.* 171
7. A common of fishery is not correctly described by alleging it to be a common fishery. *Benett v. Costar.* 183
8. Breach of covenant assigned that the defendant, to wit, on, &c., and on divers, to wit, nineteen other days between that day, &c., did, &c. Plea, that the defendant did not on the several days in the declaration mentioned, &c.: Held, on special demurer, that the plea was bad, as it took an immaterial traverse, and tied the plaintiff down to prove breaches on all the particular days mentioned in the declaration. *The Corporation of Arundel v. Bowman.* 190
9. The declaration stated that *A.* was indebted to the plaintiff in a certain sum, to wit, 26*l.* 13*s.* 6*d.*, being the balance of a certain larger sum, and that in consideration that the plaintiff would forbear to sue *A.*, the defendant undertook to accept a bill for the said balance of 26*l.* 13*s.* 6*d.* The actual balance due was only 26*l.* Held, that although the sum in the statement of the contract was not laid under a *videlicet*, yet, as it referred to the inducement where the sum was laid under a *videlicet*, and as the substance of the contract was to pay the balance due, there was no variance. *Bray v. Freeman.* 197
10. By charter party the defendant covenanted to pay freight for a cargo, at a certain rate per ton, *freight measurement*. To an action of covenant for nonpayment of freight, he pleaded, *first*, that by the usage of the particular trade an account must be produced to the freighter by the owner, before he could demand payment of the freight, and that no such account was delivered; and, *secondly*, that it was the duty of the plaintiff to deliver a freight measurement, and that he had not done so: Held, on demurrer, that these pleas were bad, as the usage so pleaded would create a new condition, and vary the terms of the original contract. *Gibbon v. Young.* 254
11. A declaration in *assumpsit* stated in the first count that the plaintiffs were possessed of lands for the residue of three terms, which respectively commenced on the 15th February, 1785; that they put them up to auction, subject to a condition that the purchaser should take the stock in trade at a valuation; that the defendant purchased the same, and that the stock was valued at a sum specified. Breach, nonpayment of that sum. The second count was for lands bargained and sold, and counts for goods sold and delivered; and the money counts were added. The leases under which the plaintiffs derived title, were dated on the day laid, *habendum* from the day of their date; and the valuation proved, after stating the prices of each article of stock, was indorsed with a memorandum, that certain pans were valued as sound, but should any of them prove broken the first time of boiling, an allowance was to be made thereon, and with that condition the stock was appraised at a certain sum, (the same as that laid in the declaration:) Held, that the statement of the day of commencement of the terms was immaterial; and that the valuation might be considered as *absolute*, as there was no proof of the pans being broken at the time mentioned. *Welch and another, Assignees of Kishau, a bankrupt, v. Fisher.* 338
12. In *replevin*, the first cognizance averred a custom within a manor for the court leet to make a regulations touching the commons, and the stocking thereof, and to order that, on breach, such penalty should be paid by the offender as to the jurors should seem meet; and a further custom that, on refusal to pay, a distress might be taken; it then averred an order of a court leet, that no person should keep on the commons, any steers after two years old, on the penalty of 20*s.* a head, and justified taking the cattle, as being steers more than two years old, and being in the common damage feasant. The second cognizance justified taking the cattle damage feasant in the *locus in quo*, as the soil and freehold of the lord. The plaintiff pleaded to the first cognizance, that the cattle, at the time when, &c., were less than two years old, on which the defendant joined issue; and for plea to the second cognizance, the plaintiff prescribed for common appurtenant over the *locus in quo*, for such cattle as should be permitted by the bye-laws of the manor, and averred the like bye-law as in the first cognizance, and that after the bye-law, and before the

time when, &c., he put his cattle, being steers less than two years old, on the common, and they remained therein feeding until, &c. The defendant replied that the cattle, at the time when, &c., were not less than two years old, on which issue was joined: Held, that the first cognizance was bad, because it did not aver any demand and refusal to pay the penalty before the distress taken, and that the plaintiff, therefore, was entitled to judgment *non obstante veredicto*, on the first issue.

Held, also, that the plea in bar to the second cognizance was bad, because it did not aver the age of the cattle at the time of the distress taken, and that the immaterial issue joined on that plea could not aid the imperfection thereof.

Held, also, that no repleader was to be awarded to the plaintiff as to the second issue. *Cleary v. Stevens.* 413

13. In an action of debt for an escape against the warden of the *Fleet*, the bill alleged that the prisoner was brought to the bar of C. P. by *habeas corpus*; and that thereupon the prisoner was by that court recommitted to the prison in execution, "as by the said commitment more fully and at large appears." Special demurrer, assigning for cause the omission of the averment that the commitment was of record. The court relying on the case of *Turner v. Eyles*, (3 B. & P. 456,) gave judgment for the plaintiff; but, on the distinction between that case and the present, being subsequently pointed out, namely, that in *Turner v. Eyles*, the objection was made after verdict, whereas, here the defect was pointed out by demurrer, the court revoked their judgment, but allowed the plaintiff to amend on payment of costs.

Semble, therefore, that on special demurrer, the omission of such averment is fatal. *Barns v. Eyles.* 512

14. The declaration stated that the defendant undertook that he would procure his co-trustee to join with him in transferring or causing to be transferred, and that the defendant and his co-trustee should accordingly transfer certain stock, standing in their joint names, and breach. The proof in support of the declaration was, that the defendant directed his bankers to sell the stock, who accordingly sold the same, by their broker, to the plaintiff for time, and informed the defendant thereof in a letter, enclosing the power of attorney; that the defendant, by letter, acknowledged the receipt of it, and wrote that he had signed the power, and had forwarded it immediately to his co-trustee; that the stock not being transferred at the day appointed, the defendant in subsequent letters to his bankers, treated the loss as one which

must be borne either by himself, or the *cestui que trust*, and acquitted the bankers of doing wrong in making the sale. The plaintiff was nonsuited: Held, that the contract was a mere conditional contract by the defendant to concur with his co-trustee in the sale, and that the nonsuit was well directed. *Leyton v. Sneyd.* 532

15. Under an averment that one of the links of a warranted chain cable broke, and that thereby the chain cable and an anchor to which it was attached, were wholly lost, it is sufficient to prove that a link of the chain cable being broken, the pilot, for the preservation of the ship and crew, slipped the cable, and that the anchor and chain cable were thereby lost.

Held, also, that under the warranty of the cable, the plaintiffs might, in addition to the value of the cable, recover the value of the lost anchor, to which the insufficient cable was attached. *Borndale and others v. Brunton and others.* 535

16. Where, in an action on the case for an excessive distress, the premises were averred to be in the parish of *St. George the Martyr, Bloomsbury*; and the proof was, that the premises were in the parish of *St. George, Bloomsbury*, the variance was held to be fatal. *Harris v. Cook.* 539
17. The acceptor of an accommodation bill, drawn by the defendants before bankruptcy, declared against them specially after their bankruptcy for not providing him with funds to pay the bill when due; whereby he had been forced to pay the costs of an action, and give a *cognovit* for the amount of the bill, and had been obliged to sell an estate in order to raise money for the payment of the same. The defendants pleaded their certificate. The court of C. P. held this a good bar under stat. 49 G. 3. c. 121. s. 8.; and the court of K. B. afterwards affirmed the judgment. *Vanandau v. Corbie and another.* 550

18. Plaintiff lessee of a farm, covenanted with the defendant, his lessor, to fetch and bring all such materials as should at any time during the continuance of the term be wanted in erecting a thrashing mill; which mill the defendant covenanted with the plaintiff to erect during the continuance of the term, for the use of the lessee and the occupiers of an adjoining farm. The defendant pleaded, first, that within a reasonable time from the date of the indenture, and during the continuance of the term, he began to provide the necessary materials for erecting the mill, and whilst he was so doing, the plaintiff desired him not to erect the same, but to refrain from so doing until he should be requested by the plaintiff; and, lastly, a plea of leave and licence

during the term: Held, on special demurrer, that both these pleas were bad. *Cordocent v. Hunt.* 596

19. The court refused to grant a new trial in an action of trespass, on the ground of a variance between the *nisi prius* record and the issue delivered; the mistake being in the issue, and the record agreeing with the declaration. *Jones v. Totham.* 634

20. Under the 54 G. 3. c. 170. s. 8., an action on a bond, given to the overseers to indemnify the parish against the expense of an illegitimate child, must be brought in the names of the overseers in office at the time of commencing the action, though they may not be the overseers to whom the bond was given. *Addy and another v. Woolley and another.* 691

21. If an assignee convert the lands assigned to him into pleasure grounds, and erect buildings on them, he cannot recover the value of the improvements in an action upon a covenant for quiet enjoyment, unless he state the special damage in his declaration specifically. *Quære.* Whether, if so stated, he could recover? *Lewis v. Campbell.* 715

PLENE ADMINISTRAVIT.

See COSTS, 1.

POLICY.

See INSURANCE, 1. LIEN. TROVER, 2.

POOR'S RATE.

See DISTRESS, 1, 2.

POST-HORSE DUTY.

The defendant being licensed to let post-horses, agreed with the proprietors of a country weekly newspaper, to convey the same on *Friday* in every week from N. S. to L., where he delivered the same for a weekly payment. The paper was conveyed by the defendant or his boy, generally on horseback, and sometimes in a one horse chaise; and the defendant was in the habit at such times of carrying parcels for hire from N. S. to L. Sometimes he carried a passenger; but in that case he paid the post-horse duty. In an action of *assumpsit* by the farmer of the post-horse duties, for duties alleged to have been incurred by him in executing this contract, the court held, that there was no letting to hire for the purpose of travelling to bring the defendant within the liability created by stats. 25 G. 3. c. 51., or 44 G. 3. c. 98. sch. *B. Douse v. Everard.* 653

POWER.

And see CROWN GRANT, 2. DEVISE, 2.

1. Lands were settled subject to a power VOL. IV.—56

of sale in trustees, with the consent of the tenant for life. A recovery was afterwards suffered, in which the tenant in tail under the settlement was vouched, and by the recovery deed it was agreed, that the recovery should enure in confirmation of the estates created by the settlement which were antecedent to the estate tail, and in confirmation of the powers annexed to those estates and subject thereto. To such uses as the tenant for life and tenant in tail should appoint. The tenant for life and tenant in tail afterwards exercised their power of appointment, and the trustees concurred with them in a conveyance of the land, and they thereby created new powers of sale: Held, that the power of sale in the original settlement was not destroyed. *Roper v. Hallifax.* 845

2. Where trustees are authorised to give receipts for the purchase money of land directed to be sold, and such purchase money is directed to be laid out in the purchase of other lands, to be settled in the same manner as the lands sold; a purchaser having paid the purchase money *bona fide* to the trustees, and having taken their receipt, cannot be affected by any misapplication of the money by them. *Ibid.*

PRACTICE.

And see ATTACHMENT. BANKRUPTCY, 11. COVENANT, 3. DISCRIMINAS. FINES AND RECOVERIES. PRACTICE OF PASSING, INSOLVENT DEBTOR. INTEREST. LANDLORD AND TENANT. PLEADING. PRISONER.

1. After trial, an affidavit, tending to impeach a verdict by stating corrupt motives in one of the jurors, cannot be received. *Hindle v. Birch and Heygate, Sheriff of Middlesex.* 26

2. A. sued out a *ca. sa.* against B., who, having put in bail, became bankrupt and obtained his certificate; A., in about two months afterwards, signed an agreement to accept a composition from B., provided all his creditors would accept the same; a few days after the signature of the agreement by A., execution was levied by him on B.'s bail: Held, that the *ca. sa.* against the principal, and all the proceedings against the bail, must be set aside; but that, as the bail had so long delayed their application, they could only be relieved on payment of costs. *Thackeray and others v. Turner.* 28

3. A declaration was delivered on the essoign day of *Hilary* term, and an imparlance to *Easter* term was obtained by the defendant. In that term a rule to plead was given, but no demand of plea was made. The plaintiff having, in *Trinity* term, signed judgment as for want of a plea: Held, that the judgment was irre-

- gularly signed, that all the proceedings thereon must be set aside, and all further proceedings be stayed. *Harvey v. Goodford.* 33
4. Bail permitted to justify at the rising of the court before the last day of the term. *Hopper and another v. Jacobs.* 56
 5. The court will discharge with costs a rule obtained on affidavits of a party, which are sworn before his own attorney in the cause. *Hopkinson v. Buckley.* 74
 6. In showing cause against a rule for judgment as in case of a nonsuit, an affidavit that the plaintiff did not proceed to trial according to notice, in consequence of the absence of a material witness, need not name the witness. *Jordan v. Martin and Wife.* 104
 7. The defendant's bail in error ought to have justified on the 26th November; but, being too late, the court permitted them to justify on the 27th. A *habeas corpus*, returnable on the 27th, had issued to the warden of the *Fleet* to bring up the body of the defendant, in order to charge him in execution; but the court held, that the operation of the *habeas corpus* was suspended by their permission; and, the bail having justified in pursuance of such permission, discharged the defendant. *Sparrow v. Sir Walkin Lewes.* 126
 8. A writ was served at eight o'clock on the evening of the day on which it was returnable; and notice, dated the same day, of a declaration being filed conditionally on that day, was given on the following morning: Held, that there was no irregularity. *Walbancke v. Abbott.* 127
 9. *Semble*, that the court will permit bail to justify, as tenant by the curtesy of lands in the *Isle of Man*, without affidavit or other evidence that the law of tenancy by curtesy prevails there. *Tomasey v. Napier.* 148
 10. The court will not grant a motion for changing the venue after plea pleaded. The plaintiff may retain the venue, notwithstanding a motion to change it, on undertaking to give material evidence arising either in the county laid or in a third county. Proof of letters containing the promise upon which the action is brought, written and put into the post office in the third county, is sufficient to satisfy such undertaking. *Smith v. Walker.* 169
 11. Where in an action of trespass to a fishery, the jury find the defendant justified on one issue, and state the right under which they found him justified, such a finding may be treated as a special verdict. *Benett v. Costar.* 183
 12. A *capias quare clausum fregit* issued against A. and B., with an *ac etiam* in debt, upon which A. was arrested. A special original in debt, a *capias*, *alias*, and *pluries*, and writs of *exigent* issued against both; there was a *supersedeas* as to A., and an *exigent* returned that B. was outlawed on the 23d October; and on the 26th November, a declaration in debt was delivered against A. entitled of *Trinity* term, averring the outlawry of B.: Held, that the delivery of the declaration was regular, but that as it was entitled previously to the outlawry, it was wrong. The court, however, allowed it to be amended on payment of costs. *Gent and another v. Abbott and Maitland.* 187
 13. Where a verdict was found against a defendant, and a material witness for him arrived for him on the next day, the court refused to grant a rule for a new trial, because no application had been made to put off the first trial. *Elmslie v. Wildman.* 236
 14. The defendant was arrested, upon a *capias* directed to the sheriffs of London, which issued upon an office copy of an affidavit of debt, sworn before the filacer for *Deron*, no affidavit having been made before the filacer for London: Held, that the proceedings were regular, and the defendant not entitled to his discharge. *Anderson v. Hayman.* 242
 15. A notice by mistake to a defendant to appear on a day which has past is an irregularity, for which the court will set aside the proceedings. *Barrata v. Lee.* 253
 16. A *capias quare clausum fregit* issued against A. and B., with an *ac etiam* in debt, upon which A. was arrested. A special original in debt, a *capias*, *alias* and *pluries*, and writs of *exigent*, issued against both, and B. was outlawed on the 23d October; after which a declaration in debt on the original was delivered against A. only, entitled of *Trinity* term: Held, that the bail were not entitled to be discharged on a motion for that purpose, upon the ground of a variance between the declaration and the process, upon which the defendant was arrested. *Gent and another v. Abbott.* 304
 17. A motion in arrest of judgment must be founded on the *nisi prius* record, (which must be taken from the issue roll,) and not on apparent error in the copy of the declaration delivered. *Newhall v. Adams.* 335
 18. A commission of bankrupt had issued against A. in 1808, under which he did not obtain his certificate. Another commission issued against him in 1813, under which he was imprisoned, and brought his action in K. B. against the commissioners for that imprisonment. At the trial, being unprepared with proof of the first commission, he was nonsuited. He then brought an action for the same cause in C. P., which court staid the proceedings in the latter action

- till the costs of the former should be paid. *Crawley v. Impey.* 407
19. It was sworn by the first of two deponents that he went to the *Fleet* prison, where the defendant was then in custody, for the purpose of serving him with a *capias ad respondendum*, and that having found the defendant therein, he tendered to him a copy of the writ, at the same time showing the original writ, and explaining to the defendant the intent of the service; but that the defendant refused to take the copy, and walked away, whereupon the deponent followed him, endeavoring to prevail on him to take the copy, but the defendant refused, and told the deponent, if he did not leave him, the deponent would get himself insulted, whereupon the deponent, fearing violence, desisted.
- It was sworn by the second deponent that, on the evening of the same day, he went to the *Fleet* prison for the purpose of delivering the copy of the writ to the defendant; that he went into the deputy warden's office, and informed him what had passed in the morning, and requested him to have the defendant into the turnkey's lodge, that the deponent might personally deliver the copy of the writ to the defendant, and show him the original: that the defendant was called by the crier, but refused to see any body except in his room; whereupon the deponent offered to go there, but was prevented by the deputy warden, who said he might not escape with his life, and that the prison would be in an uproar; that it was impossible for the turnkeys to protect the deponent, but that if the deponent would leave the copy of the writ with the deputy warden, it should be given to the defendant on the following morning; that the deponent was informed, and believed that the defendant was discharged from the *Fleet* two days afterwards; that he had made frequent attempts to serve him at his dwelling house; that the defendant could not be found, and that the deponent believed he secreted himself to avoid the service; and that the deponent had been informed by *Joseph Foulkes*, one of the turnkeys of the *Fleet* prison, that he, *J. F.*, did deliver to the said defendant personally, in the prison, a copy of the said writ: Held, that this could not be deemed good service. *Pigeon, Widow, v. Bruce and Dobson.* 410
20. At the trial of a cause, a verdict was taken for the plaintiff, subject to a case for the opinion of the court of C. P. The case, as drawn for the plaintiff, was objected to by the defendant, on the ground that it excluded the only point intended to be raised. The counsel on both sides (not of the degree of the coif,) then attended before the judge who tried the cause, who, after hearing them, and referring to his notes, decided that the case, as it stood, was correctly drawn. The defendant's and plaintiff's junior counsel then signed the case, and the plaintiff obtained a serjeant's signature, and handed the case to the defendant's attorney for signature in like manner, that it might be argued. The attorney having refused, on the ground that he should compromise the question which his client intended to try, the court gave the defendant two days to obtain the proper signatures, and, on his noncompliance, ordered the *poslea* to be delivered to the plaintiff. *Jackson and another v. Hall.* 421
21. An attorney, before whom, as a commissioner, an affidavit had been sworn in the country, had been the legal adviser of one of the deponents, and had, in *London*, told the party really interested in the cause for which the affidavit was sworn, that he intended to move the court in that cause, in which, however, he was not the attorney. The court held, that this formed no objection to the affidavit, which was accordingly received. *Williams v. John Pearce Hockin, and Hannah Reud.* 435
22. The court will not interfere to relieve an outlaw in a summary way, unless he appears, or will forward the plaintiff's suit. Therefore, where a writ of *capias ad respondendum*, with an *ac etiam* on promises, was sued out by the plaintiffs against *A.*, resident, and *B.*, a foreigner, not resident in this country, whereupon *A.* was arrested, and put in bail, and an original *quare clausum fregit*, (throughout which the singular pronoun was used instead of the plural,) giving *B.* no addition, and without an *ac etiam*, was sued out by the plaintiffs against *A.* and *B.*, followed by writs of *alias*, *pluries*, *exigent*, and *proclamation*, all properly worded, and containing clauses of *ac etiam*, and a *supersedeas* was sued out against *B.*, who was thereupon outlawed; the court refused, on motion by *B.*, to reverse or set aside the outlawry for irregularity, but left him to his writ of error. *Solly and another v. Forbes and Ellerman.* 518
23. A friend of the defendant deposited with the sheriff on the defendant's arrest, a sum in lieu of bail under stat. 43 G. 3. c. 46. s. 2. Bail was afterwards put in, and the defendant, who had become a bankrupt after the money had been deposited, surrendered in their discharge. The court held themselves bound by the statute to order the repayment of the deposit to the defendant. *Edelsten and another v. Adams.* 557
24. After a rule to plead, and notice of trial,

- given, the court refused to set aside the declaration and subsequent proceedings for irregularity, where one of the counts in the declaration delivered was delivered on unstamped paper. *Brade v. Rich.* 591
- Held, also, that there was nothing in the objection that money counts are partly printed and partly written. 591
25. Where notice to plead is given, and, before the expiration of the time named in the notice, a judge's order for further time to plead is obtained, such time is to be reckoned from the expiration of the time named in the notice to plead, and not from the date of the judge's order. *Aspinall v. Smith.* 592
26. Where the declaration filed in the office before the defendant's appearance, was indorsed as filed conditionally, and the notice served on the defendant was of a declaration generally, the court refused to set aside the proceedings for irregularity. *Watkins v. Woolley.* 644
27. An affidavit, intituled *A. against B. and another*, is bad; for the defendants should be described by their Christian names and surnames. *Doe, on the demise of Spencer and others, v. Want and another.* 647
28. The court will not compel the attendance of a witness before the prothonotary, to enable him to tax a bill of costs arising in this court, referred to him for that purpose by a Master in Chancery. *Protheroe v. Thomas.* 670
29. Where a defendant surrenders in discharge of his bail in the vacation after the term in which final judgment has been signed, that term is reckoned as one of the two terms within which the plaintiff must charge him in execution. *Niel v. Lovelace.* 674
30. The court refused to issue a *distringas* to compel an appearance on an affidavit stating the declarations of the defendant's wife, the affidavit being insufficient without them, on the ground that the defendant should not be prejudiced by the declarations of his wife. *France v. Stephens.* 693
31. Security for costs cannot be required from a foreigner in the habit of residing in this country four months in the year. *Durell v. Matheson.* 711
32. The court will not amend a rule for a new trial by providing that the action shall not abate by the death of a party, where a surety has previously entered into a bond for payment of the damages and costs of the second trial. *Lopez v. De Tastet.* 712
33. Where a verdict is taken, subject to an order of reference, if the arbitrator refuse to make his award, the court will not allow a verdict to be entered, unless the order of reference be made a rule of court. *Kirkus v. Hudson.* 733
34. A British officer serving abroad under a foreign power, not compellable to give security for costs. *O'Lawler v. Macdonald.* 736
35. Security for costs is not required from a person while in this country, although usually residing abroad. *Anonymous.* 737

PRINCIPAL AND AGENT.

See ASSUMPSIT. BILL OF EXCHANGE, 1, 2.
TROVER.

PRINTER.

See WORK AND LABOUR.

PRISONER.

And see INSOLVENT DEBTOR.

The court will not change the custody of a prisoner where the crown is concerned without the express consent of its officers. *Leigh v. Sherry.* 148

PRIZE.

1. A., when a prize was taken by a revenue cutter, bore the commission of mate, but was acting commander on board under an order from the commissioners of customs, communicated by letter to the comptroller and collector of the port to which the cutter belonged, and by them communicated by letter to A., directing him to take care that the cutter should be kept at sea *under his command*, to the end that the service might not suffer, *until another commander should be appointed*: Held, that he was entitled to the commander's share under the king's warrant, referring to a former warrant, which described the share as to be distributed amongst the commanders, officers, and crew of the vessel making the capture, as a *reward for that service*; although the former commander, whose commission as such, had been before withdrawn and cancelled on some supposed misconduct, and who had consequently left the cutter, was afterwards restored, and a new commission granted to him, bearing the date of his former commission, viz. a date anterior to the capture. *Taylor v. Pill.* 805
2. Held, that A. was not entitled to the full share of commander without deducting the share of a *deputed mariner*, who was on board at the time of the capture, but who, at the time of A.'s beginning to act as commander, acted as mate, and was acting as such, and not as a deputed mariner, at the time of capture, but without any commission or authority to act as mate. *Ibid.*

PROMISSORY NOTE.

And see MONEY COUNTS.

1. *Assumpsit* on a promissory note payable twelve months after date to the defendant, and indorsed by him as a security for the debt of the maker: Held, that the defendant was entitled to notice of non-payment by the maker; and, that evidence of a parol agreement at the time of making and endorsing the note, that payment should not be demanded till after the sale of the estates of the maker, could not be received as a waiver of the right to such notice. *Free and another v. Hawkins.* 92

2 The plaintiff agreed to take a bill of exchange drawn by the defendant and accepted by A., payable to order, in satisfaction of a promissory note for a much larger amount, on condition that the original note should revive, if the bill should be dishonored. The bill was dishonored; but no demand was made on the defendant on the day it became due; and, on the following day, the defendant tendered the amount, which the plaintiff refused to accept, and sued on the original note: Held, that the plaintiff was not entitled to recover. *Soward v. Palmer.* 277

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Distress under a magistrate's warrant to levy a sum ordered by him under the statute of laborers, 20 G. 2. c. 19. The plaintiff replevied, and removed his replevin by writ of *re. fa. lo.* into the court of C. P. The court discharged a rule *nisi* to set aside, obtained on the ground that the sixth section of the statute provided that no *certiorari* or other process should remove proceedings under that act into any court at *Westminster*; holding, that the replevin was a collateral proceeding, and not within that section. *Wilson v. Weller and another.* 521

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SPECIFIC APPROPRIATION.

A. agreed to consign goods to B. and C., foreign merchants, to be sold abroad on commission on his account, on which D. guaranteed that B. and C. should sell the goods to the best advantage. Before any transaction took place, C. ceased to be a partner with B., and D., residing in London, took C.'s place, under the firm of B. and Co. A. afterwards consigned goods to B. and Co. abroad, who remitted the proceeds to D., for the purpose of being handed over to A., who, in consequence, drew bills upon D., which he, by letter, agreed to accept, stating that he depended on A.'s promise to provide for them if remittances should not arrive from B. and Co. to meet them, and desiring that A. would write to him that the bills were drawn on account of A.'s consignments to B. and Co. A. became bankrupt, previous to which B. and Co. had remitted to D., directing him to pay A. on account of goods consigned by A., which remittances were not received by D. till after the bankruptcy. B. and Co. afterwards sent other remittances with similar directions, with which D. credited the bank-

rupt in his account, and debited him with the acceptances given by D. to A. before his bankruptcy, but paid afterwards. In *assumpsit* by the assignee of A. to recover the last remittances from D., who had applied them to the liquidation of his acceptances in favor of A.: Held, that he was not entitled to recover, on the ground of a specific appropriation of the proceeds of the goods consigned to B. and Co. before the bankruptcy, to provide for the acceptances so given to A. by D. *Thomas, Assignee of Eaton, a bankrupt, v. Da Costa,* 345

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STOPPAGE IN TRANSITU.

A trader in *London* was in the habit of purchasing goods at *Manchester*, and exporting them to the continent soon after their

arrival in *London*. The goods so consigned to him remained in the waggon office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped. A consignment of goods for the trader was delivered to the defendants on the 9th and 12th of *August*; on the 14th and 17th the goods arrived at the waggon office of the defendants, on the 16th or 17th the trader became bankrupt; and, on the 19th, notice of nondelivery to the bankrupt was given by the consignor to the defendants, who, according to order, on the 21st delivered the goods to a third house: Held, that the assignees of the bankrupt were entitled to recover the goods deposited with the defendants; and that the right of the consignor to stoppage *in transitu*, ceased on the arrival of the goods at the waggon office of the defendants in *London*. *Rowe and another, assignees of Lange, v. Pickford and another.* 83

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TITHES.

A layman, lessee of the tithes of certain closes, which the rector lets by auction in separate lots every year, proves a sufficient title to enable him to recover on the stat. 2 & 3 *Ed. 6.*, for not setting out the tithes, if he proves that he received payment for tithes in a former year. *Per Dallas, C. J., at Nisi Prius. Ganson v. Wells* 542

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1. In actions of trespass and false imprisonment, the question of reasonable and probable cause for the apprehension of the plaintiff cannot be left to the jury. *Hill and Wife v. Yates and another.* 182
2. Trespass *quare clausum fregit* may be maintained against a stranger by a tenant of the land for a trespass committed before his bankruptcy. *Clark v. Culbert.* 742

TROVER.

And see BANKRUPTCY, 1, 7. BILL OF EXCHANGE, 1. MUTUAL CREDIT. STOPPAGE IN TRANSITU.

1. Where A. consigned the goods of B. to C., and C., without notice of the right of B., sold a part, and kept the remainder in his possession: Held, that C. was liable in an action of trover by B. for the value of the goods that were sold, as well as for those that remained in his possession. *Featherstonhaugh v. Johnston.* 237
2. The bankrupt assigned a policy of assurance to the defendant; the company, however, considering it invalid, paid to the defendant half of the sum insured as a gratuity, on his giving up the policy. In an action of trover by the assignee of the bankrupt to recover the value of the policy: Held, that the value of the parchment only, and not the sum gratuitously paid, was recoverable. *Wells, Assignee of Hayes, a bankrupt, v. Wells.* 264

TRUSTEES.

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TURNPIKE.

1. A local turnpike act imposed specific tolls on carriages in proportion to the breadth of their wheels, such tolls being increased in proportion to the narrowness of the wheels, and being highest where the wheels were of less breadth than six inches: Held, that the carriages subject to such tolls were exempted from the additional toll imposed by the latter

part of the 23d section of the stat. 13 G. 3. c. 84. (General Turnpike Act), and that the local act virtually repealed that section. *Ridge and others v. Garlick and others.* 424

2. By a section of a turnpike act, carriages laden with materials for repairing roads were exempted from toll in the parishes in which the materials were to be used, or were procured; and by the same section, carriages laden with manure or lime were also exempted. By the following section, the trustees under the act were empowered to compound with persons residing in one parish and occupying lands in an adjoining parish: Held, that the exemption in favor of carriages laden with manure or lime was general, and not confined or restricted by the preceding part of the section containing the exemption, or by the following section. *Higginbotham v. Perkins.* 795

U.

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USE AND OCCUPATION.

And see ADMINISTRATOR.

The defendant, in 1799, agreed to take the premises for 17 years, at a yearly rent, and entered. In 1813, the plaintiffs contracted to sell the fee to A., who thereupon bought from the defendant the residue of his term, and, without the assent of the plaintiffs, put in a new tenant, who occupied for two years. The contract for sale of the fee was then rescinded: Held, that the plaintiffs were entitled to recover from the defendant, in an action for use and occupation, the rent from 1813 to the end of the original term, as there had been no surrender in writing of his interest, and as the plaintiffs had not assented to the change of tenancy. *Matthews and another v. Sawell.* 270

V.

VARIANCE.

See PLEADING, 3, 7, 9, 10, 11, 14, 15, 16, 19. PRACTICE, 16.

VENDOR AND VENDEE.

If a vendor has time until a given day to deliver goods, and on a prior day, when the prices are low, he refuses to proceed with the contract, after which the price rises, the purchaser, not rescinding, is entitled to recover the difference between the contract price and the higher price which the goods bear on the last day appointed for the fulfilment of the contract. *Leigh v. Paterson.* 540

VENUE.

And see PLEADING, 6. PRACTICE, 10.

In an action directed by the Vice-Chancellor to try the validity of a commission of bankrupt, it being sworn by the defendant, without contradiction by the plaintiff, (the bankrupt,) who had laid the venue in *Middlesex*, that previously to the issuing of the commission the plaintiff had resided in *Yorkshire*; that all his dealings had taken place in *Yorkshire* and its vicinity; and that all the defendant's witnesses resided there, and the plaintiff not having disclosed by affidavit that he had any material evidence to give in *Middlesex*, the court allowed the defendant to change the venue to *Lancaster* on payment of costs. *Parker v. Eastwood.* 635

VERDICT.

See SPECIAL VERDICT. PRACTICE, 1.

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W.

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See PLEADING, 13. PRACTICE, 7, 19.

WAREHOUSEMAN.

A., B., C., and D., in partnership as carriers, agreed with *S. and Co. of Frome*, to carry goods from *London* to *Frome*, where they were to be deposited in a warehouse belonging to the partnership at *Frome*, where *A.* resided, without any

charge for warehouse room, till it should be convenient to *S. and Co.* to take the goods home. Goods of *S. and Co.* carried by the partners from *London* to *Frome* under this agreement, were deposited in the warehouse at the latter place, and destroyed by fire: Held, that the partners were not liable to *S. and Co.* for the value of the goods burnt; and that *A.*, having paid the amount of the loss to *S. and Co.*, had paid it in his own wrong, and was not entitled to contribution from his partners. *In the matter of Webb, Wallington, Brown, and Brice.* 443

WARRANT.

See DISTRESS.

WARRANT OF ATTORNEY.

1. If *A.*, under arrest at the suit of *B.* gives to *C.*, the sheriff's officer in whose custody he is, a warrant of attorney for a debt due to *C.*, such warrant will be void, if no attorney be present at the execution on the part of *A.* *Faulkner v. Emmett.* 233
2. The defendant executed a warrant of attorney to enter up judgment, with the usual release of errors and defeasance, and signed an undertaking, written beneath the defeasance, that no writ of error should be brought. The plaintiff revived the judgment by *scire facias*, to which the defendant pleaded, and the plaintiff had judgment, whereupon the defendant brought a writ of error, which the court of C. P., on motion, set aside; the defendant having contended, first, that this was a release of error, and ought to have been pleaded; and, secondly, that it did not apply to the judgment on the *scire facias.* *Baddely v. Shafto.* 434
3. *A.* and *B.* gave a joint and several bond, and a warrant of attorney for jointly and severally confessing judgment thereon to *C.* for securing an annuity, payable by *B.* to *C.* After execution by *A.* and *B.*, an omission of one of the Christian names of *A.* in the bodies of the instruments was discovered, and was supplied by interlineation by the attorney of the grantee; and the instruments so altered were re-executed by *A.*, but not by *B.* *A.* was sued on the bond in *K. B.*, pleaded the judgment, and defeated the action. The court of C. P. refused, on motion by *A.*, to set aside the securities; *first*, because he had assented to the alteration; and, *secondly*, because he had recognised the validity of the judgment by pleading it. *Coke and another, Executors of Crick, v. Brummell and Radcliffe.* 439

WARRANTY.*See PLEADING, 15.***WITNESS.***See EVIDENCE, 2. 7. PRACTICE, 6. 13. 23. 28.***WORK AND LABOR.***And see EVIDENCE, 4.*

An action for work and labor cannot be brought for printing a work distributed weekly as a newspaper, unless the printer comply with the provisions of the stat. 38 G. 3. c. 78. *Quære*, whether the ac-

tion could be maintained by a printer of intermediate numbers (the first and last numbers being printed by another person) of a volume of a work published half yearly, if the name of the printer of the first and last numbers was printed at the beginning and end of the volume. *Marchant v. Evans.* 143

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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,

BY CHARLES MARSHALL.
OF THE INNER TEMPLE, M. A.

VOLUME I.

(51)

ADVERTISEMENT.

IN condensing the Reports of Mr. Marshall, and of Mr. Moore, the editors, anxious to render this work as comprehensive and valuable as possible, have introduced only such cases as have not been reported in the contemporary Reports of Mr. Taunton and of Messrs. Broderip & Bingham, which form a part of the regular series, and are reprinted in full in this work, in other volumes of which, the omitted cases will be found.

June 1, 1825.

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
MICHAELMAS TERM,
IN THE
FIFTY-FOURTH YEAR OF THE REIGN OF GEORGE III, 1813

*4]

*ANONYMOUS.

The court will not oblige an infant plaintiff to give security for costs.

Mr. Serjt., *Best*, moved for a rule to show cause why the plaintiff in this action, who was an infant, should not give security for costs. [Mr. Justice *Heath*, asked if this could be moved after issue joined: the secondary certified that it might, but not after verdict.] And he quoted the opinion of Mr. Justice *Buller* in *Doe dem. Selby v. Alston*.†

The Chief Justice observed, that the infant might have a good right of action, and was not to lose his cause because his *prochein ami* was not a man of responsibility.

Rule refused.‡

† 1 *Term Rep.* 491. In that case Mr. Justice *Buller* said, "There are only three instances in which the court will interfere on behalf of a defendant, to oblige the plaintiff to give security for costs: the first is, when an infant sues, the court will oblige his *prochein ami*, or guardian, or attorney, to give security for the costs; 2. when the plaintiff resides abroad, in which case the court will stay proceedings till security is given for costs; and 3. where there has been a former ejectment." This rule has been extended to other actions as well as ejectments. *Vide Weston v. Withers*, 2 *Term Rep.* 511.

‡ In 2 *Taunt.* 61. Anon. this court would not compel the plaintiff to give security for costs, on the ground of his being a bankrupt, or in *Newgate*.

*BELLDON v. TANKARD.

Bail being fixed, if one of them, having paid the debt, bring his action against his co-bail for contribution, he must prove the judgment as well as the execution.

THIS action was tried before Mr. Justice *Chambre*, at the last assizes at *York*, and was brought to recover the sum of 10*l.* 3*s.* for money paid to the use of the defendant. The plaintiff and defendant had been bail together, and had been fixed with the debt; the present plaintiff had paid the whole sum, and now brought this action for contribution. Mr. Justice *Chambre*, being of opinion that the plaintiff ought to have proved the judgment as well as execution, directed a nonsuit.

Mr. Serjt., *Shepherd*, now moved to set aside this nonsuit; but the court concurring in opinion with Mr. Justice *Chambre*, held the nonsuit to be right, and refused the rule.



*SPARROW v. The Earl of BRISTOL.

[*10]

An outgoing tenant having agreed to assign the remainder of his term to the incoming tenant, the sheriff, before the actual assignment made, may, under an execution against the outgoing tenant, sell his interest in such remaining term, and set upon it the same value that the incoming tenant had agreed to give for it.

THIS action was brought against the defendant as chief steward of the liberty of *Bury St. Edmonds*, for a false return to a writ of *fieri facias*. The writ had been issued against the effects of *George Smith*, who held a farm as a yearly tenant under the duke of *Grafton*, and had received, prior to *Michaelmas*, 1811, a year's notice to quit at *Michaelmas*, 1812. One *Rogers*, who was to succeed *Smith* in the farm, agreed with him some time before *Michaelmas*, 1811, for the immediate occupation of it; and it was also agreed that *Rogers* should take the hay, dung, &c., at a valuation, which valuation was to include *Smith's* interest in the remainder of his term. Before, however, the valuation was made, viz., on the 18th of *October*, 1811, the officer entered with his warrant under the writ issued by the plaintiff, and which was indorsed, to levy 117*l.* 14*s.*; but, on receiving a notice from *Rogers*, that he was in possession of the property, which he said had been valued to him, he returned that he had taken goods to the amount of 25*l.* 4*s.* 9*d.* and *nulla bona ultra*.

The cause came on to be tried at the last spring assizes at *Bury*, when it was ordered by the court, with the consent of both parties, that a verdict should be entered for the plaintiff for 1200*l.*, subject to the award of *H. Hulton*, Esq., in the usual form. Mr. *Hulton* made his award on the 10th of *May*, by which he directed a verdict to be entered for the plaintiff for 606*l.* 6*s.* of which 200*l.* were for *Smith's* interest in the farm, and the rest for the hay and other effects according to the valuation.

In *Easter* term, Mr. Serjt. *Shepherd*, had obtained a rule, calling on the plaintiff to show cause why Mr. *Hulton's* award should not be set aside, or referred back to him to be reviewed, and meanwhile the proceedings be stayed. His motion was made on two grounds: 1st, that the property had changed its owner prior to the officer's entry; 2dly, that *Smith's* interest was not such as the sheriff could take in execution; and, if it were, that he ought not to be charged with 200*l.*, the value put upon it by *Rogers*, but only so much as it would have sold for to an indifferent person.

Mr. Serjt. *Blossett*, now showed cause against this rule, upon affidavits, which stated that the arbitrator had found that the property had been taken in execution prior to the change of possession, and that 200*l.* were the real value of *Smith's* interest in the farm; and these being the questions on which the cause was referred, he contended that the award was right and conclusive.

Mr. Serjt. *Shepherd, contra*, contended that the sheriff might as well have been fixed for the good-will of a man's business, and distinguished this from the case of a lease which might have been sold; but, all events, the sheriff ought not to be charged with the sum which the incoming tenant might think it worth to himself.

Lord Chief Justice MANSFIELD.—Any man who wished to have got the remainder of this term would have given *something* for it; and it was worth, therefore, just so much as would have been given for it:—A man might have bought it for the purpose of vexation towards the incoming tenant. [Mr. Serjt. *Blossett*, observed, that in this case the crops passed for 200*l.*] That puts an end to the question; but even without that, there would have been much difficulty in supporting this rule.

The rest of the court concurred.

Rule discharged.†

† The sheriff may take and sell an annuity in nature of a rent-charge, and he may extend and sell a term of years; but nothing can be taken in execution which cannot be sold. *Com. Dig. tit. Execution, (C. 4.)*

*21] *FOULKES et al., Executors, &c. v. NEIGHBOUR.

Where a man sues as an executor, the court will require a strong case against him, to subject him to costs within the meaning of the stat. 43 G. 3. c. 46. 3.

*39] *GIBSON et al v. MAIR.

A sentence of condemnation of a neutral, by a *British* vice-admiralty court abroad, is sufficient evidence from which to presume that the ship condemned had been engaged in some illegal transaction; though the ground of condemnation do not appear in the sentence. A neutral meeting by agreement, a *British* vessel, for the purpose of receiving gunpowder and arms, is illegal, though the latter should have had a license to export them for the purposes of trade.

THIS was an action on a policy of insurance, dated the 20th of *May*, 1806, on the *American* ship *Washington*, at and from her arrival twenty-four hours on the coast of *Africa*, during her stay there, and till the delivery of her cargo at *Charleston*, in *South Carolina*. The ship sailed from *Liverpool* on the 2d of *June*, arrived in *August* on the river *Congo*, and during her stay there, on the 9th of *August*, was taken by the *Prince of Orange British* privateer, which carried her to *Surinam*, where she was condemned. The plaintiffs averred the loss to have been, 1st, By unlawful seizure, 2dly, By barratry. The cause was tried before Lord Chief Justice *Mansfield*, at the sittings after last *Trin.* term, at *Guildhall*, when the plaintiff called a witness, who stated that the boatswain of the *Washington* had been put in irons after the ship's seizure by

the *Prince of Orange*, charged with an intent to rescue and run away with the vessel. On his cross-examination, he said they had met the ship *Croydon*, by agreement, in the river *Congo*, which supplied them with gunpowder and muskets for the purpose of trading in slaves. On the part of the defendant, the sentence of condemnation was read, and the stat. 29 G. 2. c. 16.† the order in council of the 11th of *May*, 1803,‡ the license to the *Washington* to carry arms sufficient for her defence, but not for the purposes of trade, and the protest of the supercargo, stating that the ship had been seized by the *Prince of Orange*, on pretence of having powder and muskets on board, contrary to her license, were also read.—On this evidence the jury found for the plaintiffs, liberty being reserved to the defendant to move to enter a nonsuit on two grounds: 1st., That there was not sufficient evidence of a loss by barratry; and 2dly. That the condemnation was conclusive evidence against the plaintiffs, of the ship having been illegally employed. The sentence of condemnation was general, without mentioning the grounds of it; and the Chief Justice, at the trial, refused to admit parol evidence of what passed in the court of admiralty, which was attempted to be given in order to prove that she was condemned for an offence which would have amounted to barratry.

Mr. Serjt. *Lens*, on a former day, obtained a rule *nisi* for a nonsuit on these two grounds.

Mr. Serjt. *Best*, and Mr. Serjt. *Vaughan*, now showed cause, and contended that the condemnation could not have been for having gunpowder on board, because the stat. 29 G. 2. prohibiting the exportation of gunpowder, did not extend to the case of powder taken on board out of this country, [Lord Chief Justice *Mansfield* :—unless the purchase were concerted between the two ships:] and that, by that act, only the powder was forfeited, not the ship; that the boatswain having been put in confinement on a charge of barratry, it was fair to infer that barratry was the ground of the condemnation. They cited the case of the *Despatch*, 3 *Robinson's Adm. Rep.* 278., in which Sir *William Scott* decided, that any resistance to a legal inquiry, which a *British* privateer has a right to make, puts the party resisting in the situation of an enemy, and makes him liable to condemnation. They contended, therefore, that the plaintiffs were entitled to recover on the first counts, as for unlawful seizure, or in the last, as for barratry.

The Chief Justice, however, observed that it did not follow, because the master had been charged with barratry, that the condemnation proceeded on that ground; and being of opinion that the condemnation was sufficient proof that the ship had been engaged in an illegal transaction, and the other judges concurring, the rule was made absolute for a nonsuit.

† The stat. 29 G. 2. c. 16. s. 2. enacts, That whatever quantity of saltpetre, gunpowder, arms, or ammunition, prohibited by proclamation or order in council to be exported, shall be shipped on board any ship, in any port of *Great Britain*, in order for exportation, contrary to such proclamation or order, shall be forfeited, and the owner shall forfeit in the proportion of 100*l.* for every cwt. of saltpetre or gunpowder, or for every five and twenty arms; and 100*l.* for every two cwt. of any species of ammunition.

Sect. 3. enacts, That any person aiding or assisting in the shipping any saltpetre, gunpowder, &c., during the time it shall be so prohibited to be exported, shall forfeit 100*l.* and treble the value.

Sect. 4. enacts, That if any master of any vessel shall take on board, or suffer to be taken on board, any saltpetre, gunpowder, &c., for exportation, during the time it shall be so prohibited to be exported, every such master shall forfeit 100*l.*—See also 33 G. 3. c. 2.

‡ By which it was ordered, “That all ships and vessels, clearing out for the coast of *Africa*, for the purpose of carrying on the trade there, be permitted to take on board, as an assorted part of the cargoes, as much gunpowder, and as large a quantity of trading guns, pistols, cutlasses, and flints, lead balls, bars, and shot, as the exportees shall think necessary; provided, that sufficient security be given to the principal officers of his majesty's customs, of the port in which the ships are fitted out, and before they proceed on their respective voyages, in treble the value of the articles exported, that the same shall be expended in trade upon the coast of *Africa*, which security is not to be cancelled until proof of such expenditure has been made by the oath of the captain or master of the ship or vessel, in like manner as is prescribed with regard to spirits and *East India* goods used in carrying on that trade.”

HILARY TERM, 54 GEO. III. 1814

*HILTON v. HOPWOOD.

On a motion for an attachment for filing a bill in equity, contrary to an order of reference, an affidavit that notice of the motion to make the order a rule of court had been served on the party's servant, &c. is not sufficient.—If the day for making the award have elapsed without any award made, the court will not grant an attachment for disobedience to the order, unless notice of the enlargement of the time have been served upon him.

Mr. Serjt. *Shepherd*, and Mr. Serjt. *Best*, on *Friday*, the 26th of *November*, in last *Michaelmas* term, obtained a rule *nisi* for an attachment against the defendant and his attorney, in this action, for filing a bill in equity, contrary to a rule of the court. The cause, which came on for trial on the 5th of *November*, at the sittings before *Michaelmas* term in *Guildhall*, was referred to an arbitrator, to ascertain the value of the goods, for the recovery of which the action was brought. The rule of reference contained the usual clause, "that neither of the said parties should bring or prosecute, or cause to be brought or prosecuted, any writ of error, or any suit in equity, against the said arbitrator, or against each other." The defendant, however, had on the 19th of *November* following filed a bill in the court of *Exchequer*, for an injunction to restrain the plaintiff from proceeding any further in the cause. The plaintiff's attorney had served a notice of the motion to make the rule of reference a rule of court, on the defendant's servant, and on the aunt of his attorney, on the 24th of *November*, on which day the order of *nisi prius* was made a rule of the court.

Mr. Serjt. *Vaughan*, on *Monday*, the 29th of *November*, in the same term, showed cause against the rule, and contended that to make a person liable to an attachment, there should have been an affidavit of personal service of the rule, for disobedience to which he was to be brought into contempt. In this case, he said, the bill in equity had been filed, before the order of reference had been made a rule of court; so that the rule, for disobedience to which the attachment was moved for, was not in existence when the supposed contempt was committed.

Mr. Serjt. *Shepherd*, and Mr. Serjt. *Best*, *contra*, insisted that the rule which was to bring the party into contempt had been served. They admitted that the order of reference must be made a rule of court, but they contended that, when it was so made, it related back to the time of making the original order of *nisi prius*. If it could be objected that the bill in equity had been filed before the order was made a rule of court, no rule of reference, nor any other order of *nisi prius*, could bind a party from filing his bill in equity. Suppose an order of reference were made at the sittings after *Trinity* term, or an order that the matters in question should remain in *statu quo*, this could not be made a rule of court till *Michaelmas* term; and during any part of the vacation, a bill in equity might be filed, and the party violating the rule could not be attached. They distinguished this from the case of an *allocatur*, because there it was necessary that there should be an actual demand of payment.

Lord Chief Justice MANSFIELD.—It is true that the rule of court relates back to the order of *nisi prius*, but this was not a rule of court when the supposed offence was committed, nor has it been personally served.

The rule was accordingly discharged.

On the 2d of *December* following, the rule of reference, having been made a rule of court on the 24th of *November*, was personally served on the defendant and his attorney, notwithstanding which service, on the 18th of *December*, they

took a further step in the suit in equity, and the *Solicitor-General*, and Mr. Serjt. *Best*, on a former day in this term, obtained another rule *nisi*, for an attachment against the same parties.

On this day, Mr. Serjt. *Vaughan*, in showing cause, contended that as the award was to have been made on or before the 1st of *December*, which day had elapsed without any award having been made, or any notice given to the defendant of the time having been enlarged, the arbitrator's jurisdiction was at an end, and the defendant, therefore, could not be brought into contempt, for any act done by him subsequently to that time.

The *Solicitor-General*, and Mr. Serjt. *Best*, contra, contended that, as the only defect in the application against these parties last term was that there had been no service of the rule of court, and as now the order of reference had been made a rule of court, and had been personally served on the defendant, the latter had, by taking a fresh step in the suit in equity, committed an act of disobedience to a rule of court which was still binding on him; for they contended that there was no necessity to give notice of enlargement of the time for making the award.

Mr. Justice *HEATH*.—Is it not usual to give notice of the time having been enlarged? How can a party be guilty of a contempt, unless he have received such notice? The defendant, in this case, has done wrong, in filing and prosecuting the bill, but I doubt whether he has been guilty of such a contempt as would warrant the court in granting an attachment against him.

The rest of the court concurring with Mr. Justice *Heath*, it was agreed that the arbitration should go on, and the bill in equity be dismissed.



*THE KING v. THE SHERIFF OF SURRY, in a cause of [75
CAFFALL v. HUNTLEY.

Where a defendant has been arrested by a wrong Christian name, and the sheriff returns, "I have taken A. B. sued by the name of C. B.," the sheriff is a trespasser; and the court will set aside an attachment issued against him for not bringing in the body.

THE plaintiff *Caffall*, had sued out a writ of *capias* against *FREDERICK Huntley*, indorsed for 19l. 15s., by virtue of which the sheriff arrested the defendant, who was pointed out to him by the plaintiff, by the name of *FREDERICK Huntley*, and kept him in custody until he entered into a bail-bond, which he did by the name of *FRANCIS Huntley*; *Francis*, being his real Christian name. The sheriff, being ruled to return the writ, returned, "I have taken *Francis Huntley*, sued by the within name of *Frederick Huntley*, whose body I have ready." Bail above not having been put in and perfected by the defendant, an attachment issued against the sheriff for not bringing in the body.

Mr. Serjt. *Best*, on a former day, obtained a rule *nisi* to set aside this attachment, and Mr. Serjt. *Blossett*, now showed cause against it. He said, this was the case of a right person sued by a wrong name; and he contended that, though the defendant might have pleaded in abatement, the sheriff could not, after having returned "*cepi corpus*," move to set aside the attachment on this ground: At all events, he should have moved to set aside the writ.

Mr. Serjt. *Best*, contra, contended, on the authority of *Wilks v. Lorck*,†

† 2 *Taunt.* 399. In that case, the defendant had been arrested by a wrong Christian name; the court, on motion discharged him out of custody, and Mr. Justice *Lawrence* said, the sheriff was liable to an action of false imprisonment, for having so arrested him.

that the sheriff had no right to detain the defendant a single moment ; and that it never could be maintained, that the sheriff was to keep a man in custody, who had been arrested by a wrong name, in order that the plaintiff might declare against him.

Per curiam :—The sheriff was evidently a trespasser ; for it appears on the face of the return, that the defendant was sued by a wrong name.

The rule must therefore be made absolute.

EASTER TERM, 54 GEO. III. 1814.

*155]

*SIMMONS *v.* HUNT.

In an action on a bond, conditioned for the payment of an annuity, a plea stating that a memorial of the bond had been enrolled, and after reciting the memorial, that it was not a good and sufficient memorial according to the form of the statute ; without stating in what particulars it was defective, or alleging that no other memorial had been enrolled, is bad on special demurrer.

THE plaintiff declared as executrix of *Henry Hunt*, against the defendant as obligor of a bond, which had been given to the testator in his lifetime. The first plea, after craving oyer of the bond and of the condition, which was for the payment of annuity to the testator, stated that no memorial of the bond had been enrolled in the court of chancery, within twenty days after the execution thereof, according to the stat. 17 G. 3. c. 26, whereby the bond was void. The second plea, after stating that the testator had, within twenty days after the execution of the bond, caused a memorial of it to be enrolled in the court of chancery, and after reciting the memorial, proceeded thus: "which said memorial is not a good and sufficient memorial of the said bond, according to the form of the said statute, by reason whereof the bond on which this action is brought is void in law ;" and concluded with a verification. The plaintiff demurred to the second plea, showing for causes, *first*, "that the defendant had not in the said plea shown or alleged, that no other memorial of the said writing obligatory had been enrolled in the said court of chancery, besides the said memorial in that plea mentioned; and *secondly*, that the defendant had in his said plea alleged, generally, that the said memorial was not a good and sufficient memorial of the said bond, without alleging or pointing out in what particulars the same was defective, as he ought to have done." The defendant joined in demurrer, and on this day it came on for argument.

Mr. Serjt. *Heywood*, in support of the demurrer.

Mr. Serjt. *Vaughan*, in answer.

Lord Chief Justice GIBBS.—The way to try this question is to ask whether the plea might not be perfectly true, and yet a sufficient memorial have been filed? I think it might, and if so, the plea must be bad.

Mr. Serjt. *Vaughan* asked if the defendant might be allowed to amend? But the court were of opinion that the defence set up by the plea was not deserving of encouragement, and accordingly gave

Judgment for the plaintiff.

*SWAN v. COX.

A. in June, 1811, agrees to purchase a house of *B.* for 1000*l.*, paying 300*l.* down; full possession to be given by the 1st of June, 1812. *B.* is arrested in June, 1811, on which *A.* accepts a bill for *B.* in favor of *B.*'s creditors, payable if the house should be given up on the first of June, 1812. At *B.*'s request, *A.* puts his nephew into the house to take care of it, while *B.* remains in custody. *B.*, having a bad title to the house, gives up all claim to it, and *A.* purchases it of the real owner, being allowed the 300*l.* which he had paid to *B.*: Held, that the possession which *A.* had of the house from *B.*, was not such a compliance with the condition of the acceptance, as to support an action by the holder of the bill against *A.*

THE plaintiff declared that one *James Lambellie*, on the 26th of June, 1811, drew a bill of exchange upon the defendant; payable three hundred and forty days after date, for the sum of 203*l.* 19*s.* 3*d.* for sundry bills, due at *Little Hampton*, for value received; and delivered the said bill to the plaintiff; and that the defendant afterwards accepted it, "to be paid, if a certain house in the acceptance mentioned should be given up to him on the 1st of June, 1812." The declaration then averred that the said house was given up to the defendant on the 1st of June, 1812, according to the form and effect of the said acceptance. At the trial of the cause at the sittings after last *Michaelmas* term at *Guildhall*, before the late Lord Chief Justice *Mansfield*, it appeared that on the 19th of June, 1811, the defendant had agreed with *Lambellie* for the purchase of a house and furniture at *Little Hampton*, for the sum of 1000*l.*; 300*l.* of which were to be paid, and in fact were paid, at the time of making the agreement. Full possession was to be given by the 1st of June, 1812, and all the outgoings to be cleared up to that time by *Lambellie*. In the latter end of June, 1811, *Lambellie* was arrested for shooting at a sheriff's officer, and while he was in custody for that offence, his creditors, among whom was the plaintiff, prevailed on the defendant to accept the above bill of exchange, in order to cover their demands on *Lambellie*. It was proved that the defendant, at the request of *Lambellie*, procured his nephew and another person to take care of the house, and employed people to clean it from time to time; and the defendant's nephew stated that he held it on his uncle's account. On the 27th of June, 1811, a notice was served on the defendant from a *Mrs. Moore*, desiring him not to pay any more money to *Lambellie*, on account of the purchase; he, *Lambellie*, having obtained possession of the premises from her by fraud. On the 4th of July following, *Mrs. Moore* filed a bill in the Exchequer, praying, among other things, that an injunction might issue to restrain the defendant from parting with the title deeds; and on the 20th of the same month, an injunction was served on the defendant, restraining him from paying any more money on account of the purchase, and from parting with the deeds. The defendant, in his answer to this bill, admitted that he was in possession of the premises, but stated that no assignment had been made of them to him, in pursuance of the agreement between himself and *Lambellie*. On the 20th of April, 1812, *Lambellie* executed an assignment to *Mrs. Moore*, in which he admitted he had obtained the premises by fraud; and the defendant afterwards completed the purchase of the premises of *Mrs. Moore*, who allowed him the 300*l.* which he had paid to *Lambellie*. Under these circumstances, Lord Chief Justice *Mansfield* directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit, in case the court should be of opinion that the condition of the acceptance had not been complied with.

The *Solicitor-General*, accordingly, in *Hilary* term, obtained a rule *nisi*.

Mr. Serjt. *Best* now showed cause.—He contended that, the defendant having admitted that he was in possession of the house, the condition of the acceptance had been sufficiently complied with; and that it was not necessary that *Lambellie* should make a good title to it. If that had been the intention of the parties, the acceptance would have been in very different terms. This

he urged with regard to the express words of the contract; but looking at the circumstances of the case, it was plain, he said, that possession was all the defendant meant to bargain for. He contended that, as *Mrs. Moore*, by allowing the defendant the 300*L.*, which he had paid to *Lambellie*, had recognized the former agreement as valid, he ought also to have deducted from his payment to her, the amount of this bill; if he had not done so, he ought to be the sufferer, and not the creditors of *Lambellie*.

The *Solicitor-General*, *contra*, was stopped by the court.

Lord Chief Justice GIBBS.—I am of the opinion that the plaintiff cannot support this action. When *Lambellie* was arrested, the defendant, having entered into this agreement for the purchase of the house, considered that it was immaterial to him, whether he paid *Lambellie* himself, or *Lambellie's* creditors; and, accordingly, on the latter expressing a wish that he would pay his creditors, he agreed to be answerable for the amount of their claims, provided he were put in a situation to be liable to pay *Lambellie*. He, therefore, accepted the bill, payable if the house were given up to him on the 1st of *June*, 1812. The brevity of this memorandum make it necessary to refer to the extrinsic matter, and it is natural to suppose the meaning of the parties to have been that the house should be given up according to the previous agreement. On *Lambellie* being arrested, it was necessary that some one should take care of the house, and the most natural person to choose for that purpose was the defendant, who would ultimately be interested in it. No doubt, his nephew looked as much to his uncle's interest, as to *Lambellie's*; but the question is, whether in point of fact, he were not merely in possession for *Lambellie*. I am of opinion that this was not the possession meant by the agreement, but merely a custody given to the defendant, till *Lambellie* should be in a condition to complete the transfer.

The rest of the court where of the same opinion.

Rule absolute.

*184] *STAINFORTH et al., Assignees of HIBBERS and JAMES,
Bankrupts, v. FELLOWES.

Three partners, *A. B. & C.*, deliver bills to *D.*, for a special purpose: *A.* and *B.* become bankrupts:—In an action by their assignees against *D.* for the proceeds of the bills,—Held, that *C.* not having been made bankrupt, this was not a case of mutual credit within 5 *Geo. 2, c. 30, s. 18*, so as to entitle the defendant to set-off the bills against a debt due to him from *A. B. & C.*

*218] *WORCESTERSHIRE AND STAFFORDSHIRE CANAL COMPANY v. THE TRENT AND MERSEY NAVIGATION COMPANY.

A defendant cannot go to trial by *proviso*, unless there have been a default on the part of the plaintiff, though there have been a former trial, and though the defendant gave notice to the plaintiff of his intention to carry down the record.

THIS cause had been twice carried down to the assizes for trial, and the plaintiffs were each time nonsuited; but the court had each time set aside the
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nonsuit and granted a new trial, on the ground that the facts were not sufficiently before the court; and in order that, if necessary, a case might be made for the opinion of the court. Previously to the last assizes, the defendants, though there had been no default on the part of the plaintiffs, gave the latter notice that they should take the record down by *proviso*. The plaintiffs refused to accept this notice; the defendants, however, carried down the record, and the plaintiffs, not appearing, were nonsuited.

The *Solicitor-General*, on the first day of this term, moved that this nonsuit should be set aside and a new trial granted. The general rule, he said, was that the defendant had no right to carry a cause down by *proviso*, until the plaintiff had been guilty of some default, *R. M.* 1654, *Salk.* 652, and this applied equally to cases where there had been a former trial, as to other cases. The defendants would rely on the case of *Humpage v. Rowley*, 4 T. R. 767, where the court permitted the defendant to carry the record of an issue which had been directed by the Court of Chancery, down to trial, on his suggestion that the plaintiff wished to delay it. He distinguished that case from the present, by the circumstance of its being an issue out of Chancery. A rule *nisi* was accordingly granted, and on this day,

Mr. Serjt. *Lens*, and Mr. Serjt. *Best* showed cause against it.

Lord Chief Justice GIBBS.—I take the general rule to be perfectly established; that the defendant cannot carry a cause down by *proviso*, till there has been a default on the part of the plaintiff. The only case in the slightest degree resembling the present, is that of *Humpage v. Rowley*; but that would be applicable to all other cases as much as to this; and if we were to suffer this nonsuit to stand, any defendant might carry the record down by *proviso* at any time. It is true that judgment as in case of a nonsuit could not have been granted in this case; but it does not follow from that, that the defendant may carry the cause to trial, without any default by the plaintiff.

The rest of the court concurring,

Rule absolute.

*ADAMS v. ARENELL.

[*243]

On motion to change the venue, the affidavit must state explicitly that the cause of action did not arise in the county from which the venue is sought to be changed.

Mr. Serjt. *Best*, having on a former day, obtained a rule *nisi* to change the venue in this cause from *London* to *Hampshire*,

Mr. Serjt. *Lens* now showed cause against it, on the ground that the affidavit on which the rule had been obtained stated, "that the cause of action, if any, arose in the county of *Hants*, and not in the county of *Middlesex*, or elsewhere, out of the said county of *Hants*," whereas it should have been "and not in the city of *London*."

Mr. Serjt. *Best*, contended that the county of *Middlesex* might be rejected as surplusage, and then the affidavit would stand thus; "and not elsewhere out of the said county of *Hants*." But,

Per curiam, that would not be sufficient. The affidavit must state that the cause of action did not arise in the county from which the motion is made to change the venue.

Rule discharged.†

† See *Tidd's Practice*, 610, 5th edition.

TRINITY TERM, 54 GEO. III. 1814.

*The KING v. The SHERIFF of MIDDLESEX, in a cause of
THOMPSON v. POWELL.

Where a rule to return a writ, issued out of this court, expires in vacation, the sheriff must file it at the return, and cannot wait till the ensuing term: The *Common Pleas* office being open during the vacation.

It appeared by the affidavits in this case, that the sheriff was served with a rule to return a writ of *capias ad respondendum*, which is a four day rule, on the 20th of May. *Easter* term ended on the 23d of May, so that the last of the four days expired in the vacation. The sheriff, conceiving that he was not bound to file a returned writ in the vacation, filed it at the opening of the court, on the first day of the present term, on which day the plaintiff moved for an attachment against him for not returning the writ pursuant to the rule.

Mr. Serjt. *Best*, on a former day, obtained a rule *nisi* to set aside this attachment, on the authority of *The King v. The Sheriff of Berkshire*, 5 East, 386, where the Court of King's Bench held that if a writ of *fiery facias* expire in the vacation, the sheriff need not return it till the first day of the ensuing term, and has the whole of that day to file it in.

Mr. Serjt. *Vaughan*, now showed cause against the rule, and said that the practice of the King's Bench was different from that of the Common Pleas; and on appeal to the officers of the court, Mr. Secondary *Griffith* said that, when the rule expired in vacation, the Common Pleas office being in the *Temple*, and open all the vacation, he apprehended that a party was entitled to his attachment on the first day of the ensuing term.

Mr. Serjt. *Best*, *contra*, urged the inconvenience and confusion which would arise from introducing a practice into this court, different from that of the King's Bench. The writs, he said, were supposed to be returned into the court, and the sheriff was supposed to have an office in court for the purpose of returning them; how then could they be returned except in term time? The case of *The Sheriff of Berkshire* had been decided on principle, and if that decision were correct, the rule must be the same in this court.

Lord Chief Justice GIBBS.—The rule on which the case of the *Sheriff of Berkshire* was decided, is not the rule which is now in question. The rule which must govern this case, is that of 8 *Geo.* 1, by which the sheriff is to return the writ in four days. If he cannot do that, by reason of the four days expiring in vacation, he must return it on the first day of the ensuing term; but if he can do it in vacation, and do not, he will be in contempt. Now in this court the office is open in vacation; it is not open in the King's Bench, except in term time. The King's Bench, therefore, differs from this court, not because they go on different principles, but because this court can do what the former cannot.

The rule would accordingly have been discharged; but the writ having been actually returned, and no trial having been lost, the court set aside the attachment, on payment of costs.

*JONGE v. MURRAY et al.

Where a defendant is held to bail on a writ issued against himself and another, and the plaintiff declares against one only, the court will set aside the declaration and subsequent proceedings.

Mr. Serjt. *Vaughan*, on a former day in this term, obtained a rule *nisi* to set aside the declaration and proceedings in this cause for irregularity, on the ground that the defendant had been arrested and held to bail on a writ of *capias ad respondendum*, issued against the defendant and one *W. N. H.*, and that a declaration had been delivered against the defendant *Murray* alone, no process of outlawry having issued against the said *W. N. H.*

Mr. Serjt. *Best*, now showed cause against the rule, and contended that a variance between the writ and declaration was the subject of plea in abatement, and not of motion; or, at least, that the application should have been to set the defendant at large, on filing common bail. He cited *Spalding v. Mure*, 6 T. R. 363, where an original writ was sued out against three, as surviving partners of a fourth, with another set of counts against them in their own right. One of the defendants was held to bail for money received by the four partners. The declaration was against the three defendants, without saying that they were the surviving partners of the fourth. The court refused to set aside the proceedings for irregularity, but permitted an exoneretur to be entered on the bail piece.

Lord Chief Justice GIBBS.—In that case, the fourth partner was never made a defendant; and the objection was that the process was against three, as surviving partners, and that the declaration was against them in their own right. The ground on which we granted the rule *nisi* in the present case was, that one had been made a defendant in the writ, who had not been declared against, and that the plaintiff could not sue out bailable process against two, and declare against one only; indeed there is no case where that has been permitted, unless one of the defendants have been outlawed. In *Chapman v. Eland*, 2 N. R. 82, this court set aside the declaration, after the defendant had taken it out of the office, on this ground. And the Court of King's Bench did the same thing in *Moss v. Birch*, 5 T. R. 722.

Per curiam.

Rule absolute.

*The KING v. The SHERIFF of KENT, in a cause of READ v. HAYWARD. [*289

Where the sheriff, on being ruled to return a writ, gave notice to the plaintiff that the writ was lost, and that the defendant was in custody; the plaintiff should have proceeded as if the sheriff had returned *cepi corpus*; and the court set aside an attachment issued against the sheriff for not returning the writ.

Mr. Serjt. *Best*, on a former day in this term, obtained a rule *nisi* to set aside an attachment which had issued against the sheriff of *Kent*, for not returning a writ of *capias ad respondendum*, which had issued in this cause on the 23d of *April*, 1814. The affidavit of the sheriff's clerk stated that the sheriff was ruled to return the writ on the 14th of *June*, but that after diligent search he was unable to find the same, and that before the expiration of the rule, he gave notice to the plaintiff's attorney of this circumstance, and that the defendant was in his custody by virtue of process issued

out of the King's Bench; notwithstanding which, the plaintiff had moved for and obtained an attachment against the sheriff.

Mr. Serjt. *Vaughan* now showed cause against the rule, and contended that the plaintiff had only followed the regular course in moving for the attachment, and that he would have been guilty of neglect if he had not so proceeded; for he could not have ruled the sheriff to bring in the body, till either the writ was returned, or till he had obtained a certificate from the *custos brevium* that the writ was not returned.

Mr. Serjt. *Best, contra*, said the question was, whether the sheriff had done all that lay in his power. He had given notice that the writ was lost, and that the defendant was in custody, and had thereby waived the necessity of the plaintiff's obtaining a certificate from the *custos brevium*: the plaintiff, therefore, should have ruled the sheriff to bring in the body. No injustice would accrue from this attachment being set aside, because the plaintiff could still go on against the defendant, who was in custody.

Lord Chief Justice GIBBS.—The question is, not whether the plaintiff might or might not have ruled the sheriff to bring in the body, without the writ having been actually returned, but whether, under all the circumstances, there were any ground for this attachment. Without, therefore, deciding the first question, I think this attachment should be set aside. The sheriff had actually executed the writ, and was desirous of returning it, but was prevented from so doing by its having been lost. He gave notice to the plaintiff of that circumstance, and also that the defendant was in custody. The plaintiff might then have proceeded as if the sheriff had returned *cepi corpus*, and actually brought in the body.

Per curiam.

Rule absolute.

MICHAELMAS TERM, 54 GEO. III. 1814.

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*—— v. MARSHALL.

Notice of bail given on the 10th of *November*;—on the 12th, notice that other bail would be added, who would justify on the 15th:—On the 14th the latter notice countermanded, and notice again given of the original bail. They appearing to justify on the 15th, *held*, that the last notice would be sufficient, if notice of justification had been given.

Mr. Serjt. *Vaughan* opposed the justification of the bail in this action, on the ground of irregularity in the notices. On the 10th of *November*, notice was given of the persons who now appeared to justify.—On the 12th, notice was given that the other bail would be added, who would justify on the present day, the 15th. On the 14th, the second notice was countermanded, and a third notice given of the persons originally put in, and who now appeared. He contended that this, being, in fact, but one day's notice, was insufficient.

Lord Chief Justice GIBBS.—I think the plaintiff has had time enough. The notice being originally of these bail, his attention has never been withdrawn from his inquiry as to them; because the second notice was only that others would be added, and would justify to-day.

They would accordingly have been permitted to justify, but it appearing that there had been no notice of their justification, they were rejected.

*The KING v. The Sheriff of MONMOUTH, in a cause of LEWIS
v. ROBERTS.

If, to a writ of *venditioni exponas* for goods already taken in execution, with a clause of *feri facias* for the residue, the sheriff return that he has made of the said goods 20*l.* but omit, by mistake, to return *nulla bona* to the *feri facias*, the court will allow the sheriff to amend the return, and will set aside an attachment issued against him for not making the return.

IN this cause, a writ of *feri facias*, at the suit of *Lewis*, against *Roberts*, was issued on the 29th of *November*, 1813, to the sheriff of *Monmouth*, with directions to levy the sum of 92*l.* 8*s.* 5*d.*, returnable on the 20th of *January* following. On the 27th of *January*, 1814, the sheriff, having been ruled to return the writ, returned that he had levied of the goods of the defendant to the amount of 30*l.*, which remained in his hands for want of buyers. On the 10th of *June*, a writ of *venditioni exponas* for the said goods, with a *feri facias* for the residue, issued, directed to the same sheriff, who returned that he had made of the said goods the sum of 20*l.* which money he had ready; but he omitted, by mistake, to make any return to the *feri facias* contained in the writ, in consequence of which omission, an attachment issued against him. The sheriff then offered the plaintiff to pay him the sum of 74*l.* 14*s.* 8*d.*, being the amount of the debt and costs claimed by the plaintiff, provided the latter would hold it conditionally, till the result of the sheriff's application to the court should be known. The plaintiff, however, refused to take the money, with that condition; and the sheriff then paid it into the hands of the coroner, with notice to retain the same, until the court could be moved for leave to amend the return of the latter writ.

The *Solicitor General*, accordingly, on the first day of this term, obtained a rule to show cause, why the return of the writ of *venditioni exponas* and *feri facias* should not be amended by returning *nulla bona* to the *feri facias* clause of the writ, and why all further proceedings on the attachment should not be stayed; and why the sum of 74*l.* 14*s.* 8*d.* should not be returned by the coroner to the sheriff. This was moved on the affidavit of the under-sheriff, which stated that, to the best of his knowledge, the defendant was possessed of no other goods, than those which had been already taken under the former writ of *feri facias*:—That it was found impossible to dispose of the said goods for more than 25*l.* and that extraordinary expenses had been incurred, which amounted to more than 5*l.*—And that the return to the last *feri facias* had been omitted by the mistake of his clerk.

Mr. Serjt., *Vaughan*, now showed cause against the rule, on the affidavit of the plaintiff's attorney, which stated, that he had been informed that the defendant was possessed of property more than sufficient to satisfy this execution:—That after the first writ of *feri facias* had issued, two other executions, at the suit of different persons, had been levied upon the defendant, and paid; and that no warrant had been issued on the *feri facias* clause of the second writ.—He contended that this could not be considered as a mistake on the part of the sheriff, which the court would allow him to rectify. He had admitted, by his return to the first writ, that he had levied goods to the amount of 30*l.* if he were not certain that the goods would produce that sum, he should merely have returned that he had levied certain goods, which remained in his hands for want of buyers, without specifying any particular sum. To the writ of *venditioni exponas* the sheriff had returned 20*l.*, whereas the goods had been sold for 25*l.*—He had no right, he said, to retain more than his poundage.

Lord Chief Justice GIBBS.—If the fact be as you state it, the plaintiff himself might have made this motion, and might then have brought his action for a false return. It cannot be expected that, after an affidavit that this was a mere mistake of the under-sheriff's clerk, we shall leave the sheriff without remedy;

especially when we consider that, if the plaintiff have any remedy, that will be granted him by allowing this amendment. For if the defendant be in possession of any other goods, the moment the writ is amended, by returning *nulla bona*, the plaintiff may bring his action. Supposing that the sheriff ought to have issued his warrant, the court will not, on that ground, leave him without remedy.—*Per curiam*,

Rule absolute, on payment by the sheriff of the costs of the attachment, and of this application.



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*POTTS v. WARD.

Where a cause is referred to arbitration, the death of one of the parties, at any time before the award made, is a revocation of the arbitrator's authority; and the court will set aside an award made subsequently to such death.

In this action, and in another between the same parties, which came on to be tried at York, at the summer assizes 1811, verdicts were taken for the plaintiff, subject to the award of an arbitrator, to whom all matters in dispute between the parties were referred. On the 14th of February, 1814, at two o'clock in the morning, the plaintiff died, and in the evening of the same day, the arbitrator made his award, by which he awarded that the verdict should stand.

Mr. Serjt. Best, in Easter term last, obtained a rule *nisi* to set aside the award, on the ground that the arbitrator's authority was determined by the death of the plaintiff. He made several other objections to different parts of the award, which it became unnecessary to argue.

The *Solicitor General*, now showed cause against the rule. He contended that, as the arbitrator had awarded that the verdicts, which were taken before the death of the plaintiff happened, and which were taken to abide the event of the award, should stand; the award related back to the time when those verdicts were taken. If this award should be set aside, the party would lose the benefit given him by stat. 17. Car. 2. c. 8.†

Lord Chief Justice GIBBS.—I am quite clear that this award cannot stand, because the death of one of the parties is a revocation of the arbitrator's authority. Suppose one of the parties had died immediately after the verdicts had been taken; it might have been contended with the same reason that, in that case, the award ought to stand. The court will be very willing to assist the plaintiff's representatives, but it is impossible that this award can stand.—*Per curiam*,

Rule absolute.‡

† By that statute it is enacted, 'That the death of either party, between the verdict and the judgment, shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict.'

‡ In *Turner v. Cowper*, Barnes, 210., a rule was taken by consent to refer it to the prothonotary, to inquire into the *quantum* of the debt, and the value of the goods levied; and, before the prothonotary made his report, the plaintiff died:—His executor, on his application to stand in the plaintiff's place, was made a party to the rule; and the prothonotary was directed to proceed, without the consent of the defendant to this rule.

*LUZALETTI v. POWELL.

On moving for a rule *nisi* to compel the plaintiff to give security for costs, the defendant must state in what stage the proceedings are:—The court will not grant the rule *nisi* in a cause in which interlocutory judgment has been signed, until that judgment has been set aside.

THE *Solicitor General*, on a former day, moved for a rule *nisi* to compel the plaintiff in this action, and in another between the same parties, to give security for costs, on the ground that he had left this country, and was gone to reside in *Spain*; and that his attorney, on being applied to, refused to give any security.† He was not prepared to say in what stage of the proceedings the causes then stood, conceiving it to be sufficient to show that, when cause should be shown against his rule. The court, however, held that it was necessary to state it on making the motion, which the *Solicitor General*, accordingly, now did; when it appeared that interlocutory judgment had been signed in one of the actions, but that, in the other, the defendant had not pleaded. With respect to the first, he admitted that the court could not make the rule absolute, pending the judgment; but his reason for making the motion now was, that the other side might not allege that the application had not been made soon enough.

Lord Chief Justice GIBBS.—The court cannot even grant a rule *nisi*, unless the judgment be set aside. This is the same as if the motion were made in a cause which does not exist.

Per curiam—Rule refused, as to the action in which interlocutory judgment had been signed. As to that in which no plea had been pleaded, a rule *nisi* was granted.

† Where the defendant is entitled to demand security for costs, he should first apply for it to the plaintiff's attorney; 2 Smith's Rep. 661., and if the motion be not made till after notice of trial, the court of K. B. will require an affidavit that such application has been made; otherwise, not.—R. E. 47. G. 3. K. B.—Tidd's Prac. 533., 5th edition.

*— v. MELLER.

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Bail by affidavit rejected, on the ground that one of them was described in the notice of justification as *A. B.* generally, but in the affidavit of justification as *A. B. the younger*.

MR. Serjt. *Bosanquet*, opposed the justification of the bail in this case, which was by affidavit, on the ground that notice had been given that *J. S.* would justify; the affidavit which had been sent up from the country stated that *J. S., the younger*, was worth so much. By stating him in the notice generally, the plaintiff would be induced to suppose that the elder person was intended as one of the bail, and he might, perhaps, consider *him* to be sufficient.

Mr. Serjt. *Best*, contended that the plaintiff should have produced an affidavit that there were two persons of the same name.

Lord Chief Justice GIBBS.—The defendant has, by his affidavit, confessed that there are two. For, by designating this man as the younger, it must be implied that there is another of the same name; which other must be the person intended in the notice, since, in the notice, he is stated generally.—*Per curiam*,

Bail rejected.

HILARY TERM, 55 GEO. III. 1815.

*DAND v. BARNES.

A defendant may move to set aside the service of a writ for irregularity, at any time before a new step is taken in the cause.—Where common process is sued out against A. and several others; A. may move the court, if the others be not brought into court, upon an affidavit, entitled of a cause between the plaintiff and A. only.

Mr. Serjt. *Rough*, showed cause against a rule, which had been obtained by Mr. Serjt. *Best*, to set aside the service of the writ of *capias ad respondendum* in this cause for irregularity, on the ground that the year of our Lord, in the notice at the foot of the writ, was in figures. After the decision of the court, in the case of *Rogan v. Lee*, 1 Marsh, 272., he would not attempt to contend that the year, if inserted at all, must not be inserted at full length; but another question was, whether this application ought not to have been made earlier. It appeared that the writ issued on the 29th of June last, and was returnable on the 3d of November, (the morrow of *All Souls*;) and that the motion was not made till the 26th of November, being the last day of *Michaelmas* term. He cited *Pearson v. Hodgson*, Mic. 55 G. 3. K. B. M. S., which was the case of an irregularity of the same nature as the present; the *latitat* was returnable on the 6th of November, and the motion was made on the 18th; so that, in that case, there was less delay than in the present instance; the court of King's Bench, however, held, that the defendant had come too late. Another objection was, that the defendant was not entitled to make this application at all; for his affidavit was entitled in a wrong cause, viz. in *Dand v. Barnes*; whereas the action was brought against *Barnes*, together with three others, as appeared by the notice at the foot of the *capias*. On the authority of 1 Smith's Rep. 457., 2 T. R. 643., and 7 T. R. 661., he contended that the affidavit, being so entitled, was not in a condition to be read.

Mr. Serjt. *Best*, as to the latter objection, contended that, in the case of common process, he had a right to assume that the action was against one only, until the plaintiff had brought the others into court; for the plaintiff might declare against each of them separately, though in the case of bailable process, he could not, as was decided in *Jonge v. Murray*, Ante, 237. As to the other objection, that the defendant was too late in his application, he said the practice of this court was, that the defendant might make this motion at any time before another step had been taken.

The court were of opinion, that under the circumstances of the case, the defendant's affidavit was properly entitled, and that his application was made in proper time. The rule was therefore made

Absolute.

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*RINGER v. JOYCE.

Where an arbitrator, having, by mutual agreement of the parties, closed his examination, refuses the application of the defendant's attorney for another hearing, and makes his award; the court will not set aside the award, on the affidavit of the defendant's attorney, that he was in possession of evidence which would repel that, on which the award was founded.

Mr. Serjt. *Best*, had obtained a rule, calling on the plaintiff to show cause,
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why the award of the arbitrator, to whom this cause had been referred, should not be set aside. The action was brought for work and labor, and was referred to the arbitration of a gentleman at the bar, before whom the parties met at three different times. The third meeting, it was agreed, should be the last; when all the evidence on both sides was to be produced. At that meeting, the plaintiff laid certain accounts before the arbitrator, on which the award was founded. The defendant's attorney afterwards applied to the arbitrator for another hearing, alleging, generally, that he was in possession of fresh evidence, which would counterbalance the effect of the accounts produced by the plaintiff. The arbitrator, however, refused the application, on the ground that he could not, with regularity or propriety, comply with it. The present motion was made on the affidavit of the defendant's attorney, which stated that he was not aware of the nature of the accounts which had been produced, and that he had evidence sufficient to outweigh them.

Mr. Serjt. *Vaughan*, was to have shown cause, but the court called upon Mr. Serjt. *Best*, to support his rule.

Lord Chief Justice GIBBS.—I am by no means of opinion that the arbitrator in this case has made any mistake. Every case of this kind must stand on its own ground, and the arbitrator must use his own discretion, whether he will grant another hearing or not. In the present case, it was agreed that the third meeting should be the last, and at that meeting there was nothing said respecting any fresh evidence:—If any such existed, it should have been explicitly stated to the arbitrator, as a reason for deviating from the regular course. The arbitrator's answer to the application was, that he could not with propriety comply with it; and as he was to judge for himself, I think that, on that ground, he was fully justified. But the case is defective in another point; for the defendant's attorney states that, by this new evidence, the effect of the plaintiff's accounts would be destroyed. Now he could only know that from the defendant, and therefore, before we set aside this award, we should, at all events, have required an affidavit of the defendant himself.—*Per curiam*,

Rule discharged with costs.

*HOME v. SMITH.

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The court will not grant an attachment against a witness, for not appearing to give evidence, unless a clear case of contempt be made out against him.—Where the witness resides twenty-four miles from the assize town, and his expenses are not tendered to him till the evening before the trial, the court will not grant an attachment.

Mr. Serjt. *Pell*, showed cause against a rule, which had been obtained by Mr. Serjt. *Best*, for an attachment for contempt against *Daniel Knight*, for not attending to give evidence on the trial of this cause, at the last assizes at *Winchester*, pursuant to his subpoena. It appeared that the residence of the witness was twenty-four miles from *Winchester*; that the subpoena was served on the 13th of *July*; that the plaintiff, on the 19th of *July*, being the day before the cause was expected to be tried, tendered him 1*l.* for his expenses, which the witness refused; and that in the evening of the same day, the plaintiff tendered him the sum of 3*l.* for his expenses. The court, he said, would not grant an attachment, unless all necessary expenses had been tendered at the time when the subpoena was served. He cited *Fuller v. Prentice*, 6 H. B. 49.—*Bowles v. Johnson*, 1 Bl. 36., and *Hallet v. Mears*, 18 East, 16.

Mr. Serjt. *Best*, *contra*, observed that the sum tendered was quite sufficient to defray all reasonable expenses; and that, if this attachment were not granted,

witnesses would be encouraged to make a bargain for their expenses, so as to enable them to make a profit of their evidence.

Lord Chief Justice GRASS.—This would be a very good argument to a jury, on an action against a witness, but before we can grant an attachment, we must have a very clear case of contempt made out against him. The question is, not whether those, whose testimony is wanted at the trial of a cause, shall be permitted to extort money from the parties, but whether a case have been made out against the witness, sufficiently clear to induce the court to grant an attachment against him. I do not think that it is absolutely necessary to tender sufficient conduct money, at the time of serving the subpoena; because, in some cases, a party may at first tender an insufficient sum, and on that being refused may increase his offer. I am far from thinking, however, that, in the present case, the plaintiff has brought himself within the rules which the court requires. The subpoena was served a week before he trial, and it is not pretended that any adequate offer was made till the evening before the trial. If the plaintiff have any real ground of complaint,—If he have lost any thing by the absence of this witness, he has his remedy by bringing an action on the case against him,† but to that remedy he must be left.—*Per curiam*,

Rule discharged.‡

† Given by stat. 5 *Elis. c. 9. s. 12*, for the penalty of 10*l.* and further recompense, if assessed by the court.

‡ *Vide*. 1 *Marsh. p. 42*.

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*SERRA, et al., v. FYFFE.

To debt on bond, the condition of which was, 'that *A. B.* should deliver a true account of all moneys received by him in pursuance of his office,' the defendant pleaded performance generally;—The plaintiff in his replication, assigned for breach, 'that *A. B.* was requested to deliver a true account of all moneys received by him in pursuance of his office, but refused so to do.'—Held, on special demurrer, that this assignment of the breach was bad, in not alleging, 'that *A. B. had* received any moneys by virtue of his office.'

THE plaintiffs declared as obligees of a bond, dated the 25th of *March*, 1805, against the defendant, as obligor, in the penalty of 1000*l.* The defendant cravedoyer of the bond, and of the condition, which, after reciting that one *W. Begbie*, had been appointed collector of the poor's rates, in the parish of *St. George the Martyr*; and that the defendant and *I. H.* had proposed themselves as security for the said *W. Begbie*, until all accounts should be fully and truly settled and paid; provided, "that if the said *W. Begbie*, did and should, from time to time, and at all times thereafter, deliver to the directors of the poor of the said parish a just and true account in writing, of all moneys received by him in pursuance of his office, and from whom received respectively, and of all sums of money from time to time outstanding, with the names of the persons from whom due, verified upon oath; and should well and truly pay to such persons, for such purposes, and in such manner, as the directors should appoint, all such sums as should appear to be received by him, without fraud or further delay; and in all other respects justly, truly, and faithfully discharge and execute the duties of his office;—then the obligation to be void."—The defendant then pleaded *first, non est factum*; *secondly*, that the said *W. Begbie*, did from time to time, and at all times after the making of the said writing obligatory, well and truly observe, perform, fulfil, and keep all and singular the articles, clauses, payments, conditions, and agreements in the said condition specified, on his part and behalf to be observed, &c., according to the true intent and mean-

ing thereof.—The replication, as to the second plea, alleged that *W. Begbie*, continued collector of the said rates until the 26th of *February*, 1812, when he was requested by the said directors to deliver to them a just and true account in writing of all moneys received by him, in pursuance of his said office, and from whom received respectively, but that he refused so to do. There was a further breach, which stated that *W. Begbie*, received divers sums of money, which he did not pay over as directed; on which breach issue was taken. To the *first* breach, the defendant demurred;—assigning, among other causes of demurrer, that it was not alleged, nor did it appear thereby, that the said *W. Begbie*, ever received any moneys by virtue of his said office; and that the said first breach contained a negative pregnant, in alleging that the said *W. Begbie*, had not delivered an account of the moneys received by him in pursuance of his office, without averring that he *had* received moneys in pursuance of his office; by the omission of which averment, the defendant was prevented from traversing and putting the same in issue. The plaintiff joined in demurrer, and on this day the case came on for argument.

Mr. Serjt. *Vaughan*, was to have argued in support of the demurrer, but the court called on the plaintiff's counsel to support the replication.

The *Solicitor General*, accordingly cited *Willcocks v. Nicholls*, 1 Price's Excheq. Rep. 109.—Com. Dig. tit. Pleader, (C. 45.)

Lord Chief Justice GIBBS.—The practice formerly was, for the defendant to allege performance specially in his plea, and while that particularity was required in the plea, the replication was much facilitated by it.—The rule was held so strictly that in a case like the present, it would have been necessary for the defendant to have averred, either that he had received no moneys, or, if he had, that he had accounted for them; and general performance would have been bad on special demurrer; but if the plaintiff had not demurred, it would have been incumbent on him to point out the special breach.—Where there are some conditions in the negative, and some in the affirmative, or where some are in the alternative, general performance is not sufficient. In this view of the case, therefore, and unless the law on this subject be much altered since I had more to do with pleadings than I lately have had, the breach is ill assigned. I think the plaintiffs had better move to amend.

The plaintiffs, accordingly, had leave to amend, on payment of costs; and the defendant was at liberty to plead *de novo*.

*PAYNE et al., plaintiffs, and GARRICK et ux., Deforciantes. [*468

A fine may be amended, by striking out the names of the parishes, in which the lands were erroneously described to be situated; those lands being extra-parochial.

*ARBOUIN v. WILLOUGHBY. [477

Proceedings set aside, on the ground that the defendant, having two *Christian* names, issued by only one of them.

Mr. Serjt. *Vaughan*, showed cause against a rule to set aside the proceedings in this cause, on the ground that the defendant was sued by the names of

William Willoughby, his Christian name being *Hans William*. He contended that this was no variance, for the defendant was not called by a different name from his real name.

Lord Chief Justice GIBBS, however, observed that this was the same as if the plaintiff had declared against the defendant by the name of *William* only, and the defendant had pleaded in abatement, in which case he would have been entitled to judgment.—*Per curiam*.

Rule absolute.

TRINITY TERM, 55 GEO. III. 1815.

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*BROWN v. CRUMP.

A declaration that in consideration that the defendant *had* become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon, and to keep the buildings in repair:—Held, bad on general demurrer; those obligations not arising out of the bare relation of landlord and tenant.

THIS was an action of assumpsit, and the first count of the declaration stated that, whereas the defendant, on the 24th of *November*, 1808, at his special instance and request, *had* become and was tenant to the plaintiff of a certain farm and premises; in consideration thereof, the defendant then and there undertook and faithfully promised the plaintiff to make not less than thirty acres of fallow on the said farm yearly, during the said tenancy, and to spend 60*l.* worth of manure every year upon the farm, and to keep the buildings thereon in repair, being allowed timber in the rough; that the defendant was and continued tenant to the plaintiff till the 29th of *September*, 1814:—Yet that he did not, nor would, during the continuance of the said tenancy, make thirty acres of fallow on the said farm each year, nor spend 60*l.* worth of manure every year upon the said farm, nor keep the buildings in repair, though the plaintiff was ready and willing to allow him timber in the rough for that purpose.—To this count the defendant demurred generally, the plaintiff joined in demurrer, and the case now came on for argument.

Mr. Serjt. *Best*, cited *Powley v. Walker*, 5 T. R. 373.—*Gibson v. Wells*, 1 New Rep. 290.

Mr. Serjt. *Copley*, *contra*, mentioned the case of *Stewart v. Wilkins*, Doug. 18, where an objection was taken to the usual mode of declaring on the warranty of a horse;—that the defendant promised that the horse *was* sound;—but was overruled. [Lord C. J. *Gibbs*.—The objection there was, that all promises should be executory, but the court, and particularly Mr. J. *Buller*, held that they were not necessarily so. The doctrine which I have often heard Mr. J. *Buller* lay down is, that every tenant, where there is no particular agreement dispensing with that engagement, is bound to cultivate his farm in a husband-like manner, and to consume the produce on it; this is an engagement which arises out of the letting, and which the tenant cannot dispense with, unless by special agreement; but it does not follow that a tenant shall be bound to have a certain portion of land every year in a certain tillage.] Mr. Serjt. *Copley*, after this intimation, declined to argue the question, but had

Leave to amend, on payment of costs.

*KENNINGTON v. ANDERSON.

n the notice to appear at the foot of the process, it is not necessary that the year should be stated in words at length.

In this case a motion had been made last term to set aside the proceedings for irregularity, in having the year in the notice at the bottom of the process in *figures*; which in *Rogan v. Lee*, 1 Marsh. 272, was held to be irregular. The court expressed their intention of conferring with the judges of the *King's Bench* on the subject; and this case, with several others, stood over till this term, and

Lord Chief Justice GIBBS now delivered the opinion of the court. In *Rogan v. Lee*, following the decision of the Court of King's Bench, we decided that it was necessary that the year should be in words at length; but we have had a communication with the judges of that court on the subject, and on conferring together we are of opinion that, on the whole, there is not sufficient ground for supporting that decision; and that as the year is not mentioned at all in the act, 1 Marsh. 272, note a., it is sufficient to set it out in figures.

Rule discharged.

*JOHN GREY, plaintiff, and JOHN WAINWRIGHT et ux.
THOMAS WAINWRIGHT et ux., THOMAS COVERDALE [*578
and SUSANNAH his wife, deforciantes.

The præcipe and concord of a fine amended, by inserting the real Christian names of the deforciantes, instead of those which have been erroneously inserted.

*ADAMS, demandant;—RADWAY, tenant.

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The court will not assist the demandant in a writ of right; and, therefore, will not allow him to quash a writ of summons which has been irregularly executed.

Mr. Serjt. *Pell* moved, on the part of the demandant in this writ of right, for leave to quash the writ of summons to the four knights, (who choose the twelve to try the right;) on the ground that no previous notice of executing it had been served on the tenant's attorney. The application, he said, was made in the demandant's own delay, *ex majori cautela*, lest it should be objected that the tenant would have had a right to challenge the four knights. For though it was laid down by Lord *Coke*, Co. Lit. 294, a., that they could not be challenged, the contrary appeared by 15 *Edw.* 1. 4, and the manner in which they were to be challenged was there stated.

Lord Chief Justice GIBBS.—The rule which has been adopted on consideration is, that as a writ of right generally seeks to disturb a possession which has continued for a considerable length of time, the court will not assist the demandant in getting over any difficulties that may occur to him.

The rest of the court concurred in the opinion of the Chief Justice; Mr. Justice *Heath* observing, that it was in general a very vexatious proceeding; and accordingly the application was

Rejected.†

† See 2 *Williams's Saund.* 45, note 4, on the proceedings in a writ of right.

*BROWN v. CRUMP.

Where the plaintiff, having obtained leave to amend a count in his declaration, adds new counts, which contain no new cause of action, but only vary the *manner* of stating that which was demurred to, the court will not order them to be struck out.

In this case, the defendant having demurred to the first count of the declaration, the plaintiff had leave to amend it, *Vid. supra.* 567. (*Ante*, 303,) and added three new counts, not containing any new cause of action, but only varying the former so as to obviate the objection.

Mr. Serjt. *Best*, on a subsequent day, moved that the new counts should be struck out of the declaration, on the ground that the court had only given leave to amend the count demurred to.

Mr. Serjt. *Copley*, now showed cause against the rule, and contended that, though the plaintiff could not have added new counts for a different cause of action, there could be no objection to those which had been added; for they had only changed the form of the consideration, making it executory, instead of executed, as it originally stood.

Mr. Serjt. *Best*, *contra*, observed that, whether the court would have allowed this addition on motion or summons, was not the question;—The defendant should have an opportunity of objecting to them.

Lord Chief Justice GIBBS.—There is no doubt but the plaintiff might have had leave to add these counts, if he had applied for it; because it is evident that what was unnecessary before, may be very necessary now, in order to meet the different circumstances of the case. On the other hand, the defendant should have an opportunity of examining the additional counts; and if it appear that there is any material alteration in the statement they may be struck out; but the new counts being introduced only to vary the *manner* of stating the consideration, the court will not order them to be struck out.

Rule discharged.

END OF 1 MARSHALL.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
EXCHEQUER CHAMBER.

BY CHARLES MARSHALL,
OF THE INNER TEMPLE, ESQUIRE, BARRISTER AT LAW.

VOLUME II.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
MICHAELMAS TERM,
IN THE
FIFTY-SIXTH YEAR OF THE REIGN OF GEORGE III. 1815.



*40]

*PRICHARD v. COWLAM.

Where a married woman has been arrested as acceptor of a bill of exchange, at the suit of an *indorsee*, the court will not order the bail bond to be cancelled, on an affidavit that the *drawer*, when he drew the bill, knew the defendant to be a married woman.

Mr. Serjt. *Copley*, moved for a rule to show cause why the bail bond in this action should not be given up to be cancelled, on an affidavit which stated that the defendant was a married woman; that she had been arrested as the acceptor of a bill of exchange, drawn by one *Manneville*, and indorsed to the plaintiff; and that the *drawer*, at the time when he drew the bill, knew the defendant to be a married woman.

Lord Chief Justice GIBBS. But the drawer is to be supposed to have indorsed it over to the plaintiff for a valuable consideration. Is not this bill such a representation of the defendant as a single woman, as falls within the rule of this court, not to interfere where a married woman has held herself out as single?

The court were of that opinion, and the rule was accordingly

Refused.

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HILARY TERM, 56 GEO. III. 1816.

*PITCHER, gent. v. The Sheriff of MONMOUTH.

In an action by an attorney for an escape, it is not a sufficient ground for deviating from the general rule not to change the venue in such case, that the witnesses on both sides reside in the county to which the venue is to be changed.

Mr. Serjt. *Bosanquet*, moved for a rule to show cause why the venue in this action should not be changed from *Middlesex* to *Monmouth*, on the defendant's affidavit, that both his own witnesses, and, as he believed from a conversation with the plaintiff, those of the plaintiff also, were resident in the county of *Monmouth*. There were two objections to the motion, one, that the action was for an escape,† the other, that the plaintiff was an attorney;‡ he admitted, therefore, that the application could not be complied with on the common affidavit, but cited *Evans v. Weaver*, 1 B. & P. 20, where the court held that, in an action on a promissory note, in which the general rule is that the venue cannot be changed, the defendant might do it, on an affidavit stating the number of his witnesses who resided in the county to which the venue was to be changed. In the present case, the affidavit went further, for it stated that the plaintiff's witnesses also resided in *Monmouthshire*.

Lord Chief Justice GIBBS. I do not think that this is a case, in which the court would grant the rule. It is a deviation from the general practice to change the venue at all in an action for an escape; and it has only been done on particular grounds. The ground of the present application is a very general one; viz. that the witnesses of both parties reside in the country:—And when you add to that, the circumstance that the plaintiff is an attorney, so that he has the law and his privilege both on his side, I think the court cannot listen to this application.

Per curiam,

Rule refused.

† *Per Lord C. J. Holt*, *Mic. 10 W. 3 K. B.*, cited in *Heathcoat's case*, 2 Sel. 670. But see *Davies v. Farry*, Barnes 493, where, in an action for an escape, the plaintiff showed for cause against the common rule for changing the venue from *Middlesex* into *Monmouthshire*, that the defendant's under sheriff ought not to have any concern in returning the jury process:—The rule was made absolute, the jury process, by consent, to be directed to and returned by, the coroners. And in *Foster v. Taylor*, 1 T. R. 781, the venue was changed, in debt on bond, to the place where the plaintiff's, as well as the defendant's witnesses resided. *Aliter* when the defendant's witnesses, *only*, resided there. *Ibid.* 782, n.

‡ See the cases cited, *Tidd*. 607, 5th edit.

*GARLE, demandant; ORAM, tenant; MASON, vouchee. [*194]

The court will not amend a recovery, by adding the *tithes* of the premises under the word *hereditaments*; where that word does not occur in the operative part of the deed.

EASTER TERM, 54 GEO. III. 1816.

*BOVILL v. MOORE, et al.

Where a person obtains a patent for a machine, consisting of an entirely new combination of parts, though all the parts may have been used, separately, in former machines, the specification is correct in setting out the whole as the invention of the patentee:—But if a combination of a certain number of those parts have previously existed up to a certain point, in former machines, the patentee merely adding other combinations, the specification should only state such improvements; though the effect produced be different throughout.

THE plaintiff in this action was assignee of a patent granted to *John Browne*, 'for a machine for the manufacture of bobbin lace, or twist net, similar to and resembling the *Buckinghamshire* lace net, and *French* lace net, as made by the hand with bobbins on pillows;' and this action was brought for infringing the patent by pirating this machine. The specification described the nature of the invention, and in what manner the same was to be performed, by six plans or drawings annexed to the patent, which represented the different parts of the machine, and different views of the whole.

The cause was tried at *Guildhall*, at the sittings after last *Hilary* term, before Lord Chief Justice *Gibbs*, when it appeared that the merits of the invention consisted in the mode of supplying the longitudinal or warp threads, and the diagonal threads respectively: The former being supplied from distinct magazines, called *bobbins* and *jacks*, instead of from the beam, as in the common machines; by which means the workman was enabled to form his twist by their agency, which otherwise he could not have done:—The latter being supplied from a roller or beam to which the diagonal threads were fixed, and which, by means of a planetary or rotary motion, disposed of those threads over the whole breadth of the piece of lace. On the other hand, the defendant proved that, up to the point when the perpendicular threads cross each other, for the purpose of forming the mesh, the operation of the machine, was similar to the old machines, and particularly to one for which a Mr. *Heathcote* had obtained a patent two years previously to that of *Browne*.—It was contended by Mr. Serjt. *Copley*, on the part of the defendants, that though the contrivance above stated was new and extremely useful, the specification ought to have pointed out that only, and the patent ought to have been for an *improvement* only;—whereas the specification stated, and the patentee claimed, the *whole* machine as his invention.—The Chief Justice told the jury that if they thought *Browne* had invented a perfectly new combination of parts, from the beginning, through all the parts, separately, might have been used before, his specification would be good:—But if they should be of opinion that a combination of a certain number of those parts had previously existed up to a certain point, and that *Browne* had taken up his invention from that point only, adding other combinations to it, then his specification, which stated the whole machine as his invention, was bad. The jury were of opinion, that up to the point of crossing the threads, the combination was not new, and accordingly found a verdict for the defendants.

The *Solicitor-General* now moved that this verdict should be set aside and a new trial granted. He admitted that the operation of the machine in question was, to a certain extent, the same as the former ones; but he insisted that the effect thereby produced was wholly different; viz. in the manner of supplying the threads:—The good effect of the invention was not disputed, and that effect was begun to be produced the moment the machine began to work: though

neither the novelty nor the excellence of the invention were immediately apparent. An *improvement*, in the legal sense of the word, was an *addition* made to the machine, which was to take effect in a subsequent stage of the operation; whereas *here*, the whole texture was carried on by a new process. He, therefore, contended that the specification was correct, in setting forth the whole machine by which this operation was produced.

Lord Chief Justice GIBBS.—If I really felt any doubt as to the propriety of this verdict; or, thinking as decidedly as I do that the verdict was correct, if I found there were any doubt in the minds of the rest of the court, I should be desirous of granting a rule to show cause, because this is a question of great importance to the parties: But after giving all the consideration possible to it, and after attentively hearing all that has been urged on the part of the plaintiff, no doubt remains in the minds of any of the court.—I think a little confusion has been made between a new machine for making lace, and lace made in a new method by a machine partly old and partly new. In order to try whether it be, or be not, a new machine throughout, we must consider what the patent purposes to give to the patentee, and what privileges he would possess under the patent. Now the patentee is entitled to the sole use of this machine; and whoever imitates it, either in part or in the whole, is subject to an action at the suit of the patentee. Suppose it had been a new invention from beginning to end, and after *Browne* had obtained his patent, *Heathcote* had made a machine like those which he now makes; is there any doubt but that such a machine would have been an imitation, in part, of *Browne's* invention? Indeed all the defendant's witnesses agreed in stating that, though the same thought might have occurred to two persons, yet if *Browne* had seen *Heathcote's* machine, before he made his own, they should have had no doubt but that, up to a certain point, *Browne's* was an imitation of *Heathcote's*.—It is not immaterial to consider that the drawings or plans of the machine were divided into six different sections, each containing a part of the machine in a different stage of its progress; and that as to one of them, which contained all the principle of the warp, the witnesses said that every part of that section existed in the old machine; and that a machine, carried no further than that, would have been a very useful invention. How then can it be said that *Browne's* specification, which described from its root a machine containing a part which was common to *Heathcote's*, does not contain more than *Browne* himself invented?

Mr. Justice DALLAS.—After the full investigation which this case has undergone, I feel no doubt which would justify our sending it to another jury. As to the law, it is quite clear that if the invention set up be only an addition, the patent must be for that addition only; as in the case of the invention of a particular movement of a watch. The case, therefore, resolves itself into a question of fact; whether it be a new machine *in toto*, or from a certain point only: And so far from its being an entirely new invention, the witnesses said that if *Heathcote's* had been made after *Browne's*, it would have been an infringement on *Browne's* patent; such patent, therefore, to the extent contended for, was void.

Mr. Justice PARK.—The law was fully and most correctly laid down to the jury by his lordship. Nor is this new doctrine; for in the case of *The King v. Else*, Sitt. West. Mich. 1785, *Buller's* N. P. 76, 8th edit. Mr. Justice *Buller* held that the patent must not be more extensive than the invention; and, therefore, that, if the invention consisted of an addition or improvement only, a patent for the whole machine was void. Now in the present case, the jury have found that, up to a certain point, the machine acts like the former ones; the invention, therefore, is only a valuable improvement.

Mr. Justice *Abbott* was absent.

Rule refused.

*HARDING v. PURKISS.

A rule having been obtained for setting aside proceedings, the court refused to discharge it, on the ground that it had been obtained by a person not qualified to practise as an attorney; the defendant not being privy to the irregularity.

Mr. Serjt. *Copley*, in last *Hilary* term, obtained a rule to show cause why the proceedings on the bail-bond should not be set aside for irregularity, on the ground that the defendant had been discharged under the insolvent debtor's act, and that the debt, for which the present action was brought, had accrued prior to such discharge. The rule was drawn up on reading the affidavit of the defendant, "and of *James Ullmer*, attorney for the defendant," and

Mr. Serjt. *Vaughan*, who now showed cause, objected that no such person as *James Ullmer* was on the rolls of the court; that the application, therefore, was a fraud on the court and on the practitioners.

Mr. Serjt. *Copley*, *contra*, said that though Mr. *Ullmer* might be liable to penalties for practising without being qualified, there was no authority to show that what had been done by him, was absolutely void; and it appeared that, from the representations of Mr. *Ullmer*, and from the words '*Ullmer, Attorney*,' being on his door, the defendant had reason to believe that he was authorized to practise as an attorney.

The court observed that it would be gross injustice to turn a party round because he had been deceived by his pseudo-attorney; that no instance had been mentioned in which the proceedings had been set aside on such a ground, to the prejudice of the client; that on the contrary, where notice of bail had been given by a person not qualified, the court had nevertheless held the notice good; and they overruled the objection.—And it appearing that the defendant's application was well founded in fact, the rule was made

Absolute.†

† In *Hopwood v. Adams*, 5 Bur. 2660, the Court of King's Bench set aside a judgment which had been entered up by an attorney's clerk, using the name of a regular attorney, without the knowledge or consent of the latter. It is not stated in that case, whether the plaintiff were privy to, or ignorant of, the informality.



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*HUMPHRIES v. WILLIAMS,

An affidavit of debt, stating that the defendant is indebted to the plaintiff, as indorsee of a bill of exchange, drawn by one *T. W.* at a day now past, without stating in what character the defendant became liable, is insufficient.

THE *Solicitor-General*, on a former day, obtained a rule to show cause why, upon a common appearance being entered for the defendant, the bail-bond should not be delivered up to be cancelled, on the ground that the affidavit of debt was insufficient. It stated that the defendant was indebted to the plaintiff in the sum of 95*l.* and upwards, 'as the indorsee of a certain bill of exchange, drawn by one *T. Winslow*, at a certain day now passed;' without stating how the defendant became liable; whether as acceptor, or indorser.

Mr. Serjt. *Best* now showed cause. In *Bradshaw v. Saddington*, 7 East, 94, an affidavit, stating that the defendant was indebted on a bill of exchange, drawn by the defendant, and due, and unpaid, was sufficient, without stating in what character the plaintiff became entitled to sue.

Lord Chief Justice GIBBS.—In that case, the omission was of the *plaintiff's* title to sue;—here the objection is that it does not appear in what character the *defendant* stands: All the precedents in the books of practice contain that statement.

Per curiam,

Rule absolute.†

† In *Balbi v. Batley*, 1 Marsh. 424, the court held that an affidavit, which stated that the defendant was indebted to the plaintiff on promissory notes of the defendant, without stating how the plaintiff became entitled to recover upon them, was defective. On that occasion, however, the case of *Bradshaw v. Saddington* was not cited. 2 Marsh. 83; 1 Marsh. 315, 317, 424, and 535.

*BURTON v. ATHERTON.

[*232]

Bail rejected, on the ground that one of them was a peer of the realm.

Mr. Serjt. *Heywood* opposed the justification of the bail in this action, on the ground that one of them, Lord *Redesdale*, was a peer of the realm; and on the authority of *Graham v. Stuart*, 4 Taunt. 249, where the court refused to permit a member of the house of commons to justify, the objection was considered valid; but the court gave the defendant time to put in another bail.

*HERMER v. TILT.

[*251]

An attachment against the sheriff, for not bringing in the body, can only be granted on an *affidavit* of service of the rule;—and no evidence, however strong, that the sheriff had received the rule, will supply the want of it.

Mr. Serjt. *Best*, in moving for an attachment against the sheriff of *Worcestershire*, for not bringing in the body of the defendant, stated that there was no affidavit of the service of the rule to bring in the body; but produced a letter from the under-sheriff, directed to the plaintiff's attorney, in which the under-sheriff had returned the original rule, indorsed with an acknowledgment of the receipt of it.—The *Chief Justice*, however, said that the strict rule was, that there must be an affidavit of service of the rule itself, and that though the facts stated constituted the strongest proof of service of the rule, it was better to adhere to the established practice;—that the court was very cautious of making any deviations, and as no case could be cited in which the rule had been relaxed,—the officers of the court not recollecting any such case,—his Lordship said the court ought not to grant the rule.

Rule refused.†

† An affidavit of service of a *copy* of the rule is not sufficient, without adding that the original rule was at the same time shown to the officer.—*Barnard v. Berger*, 1 N. R. 121.

*BURN v. The Sheriff of MIDDLESEX.

Where the sheriff suffers a person, who has been arrested, to go at large without taking a bail-bond, the court will not suffer him to render the defendant after action commenced against him for an escape; though he should not have been ruled to return the writ or bring in the body, before action commenced.

Mr. Serjt. *Blosset*, on a former day, moved for a rule, calling on the plaintiff to show cause why the proceedings in this action, which was for an escape, for not taking a bail-bond, should not be staid, upon payment of the costs of the writ and of the present application; and why *James Bond* should not be brought up from the *Fleet*, and surrendered in discharge of this action. It appeared that *Bond* and his partuer having been severally arrested in several actions, one of which was in this court, against *Bond* only at the suit of the present plaintiff, directed their attorney to render them in discharge of all the actions; which was accordingly done on the first day of the present term, except in the action by the plaintiff against *Bond*, that action having been omitted by mistake:—that on the 8th of *May*, the plaintiff would have been entitled to an attachment, but that he did not rule the sheriff to return the writ, nor bring in the body; but on the 9th of *May* brought the present action for an escape. He cited *Allingham v. Flower*, 2 B. & P. 246, where the court set aside the proceedings in an action similar to the present, bail having justified after the commencement of the action. In the present case he did not move on the ground of irregularity, but merely that this mistake might be rectified.

The Chief Justice observed that the principle on which the court had acted was, that an action for an escape was to be considered as standing on the same footing as a motion for an attachment, *Webb v. Matthew*, 1 B. & P. 225, and as they would not grant an attachment after bail had justified, *Thorold v. Fisher*, 1 H. B. 9.—*Weddal v. Berger*, 1 B. & P. 325, so they would stay proceedings in an action for an escape, under the same circumstances; that as the plaintiff could not have moved for an attachment, without first ruling the sheriff to return the writ or bring in the body, which he had not done, and which would have been warning to the sheriff, the present action must be considered as a surprise upon the sheriff. And the court, supposing that the sheriff had kept *Bond* in custody, when he was arrested at the suit of the plaintiff, granted a rule *nisi*.

Mr. Serjt. *Best* now showed cause on an affidavit, which stated that shortly after *Bond* had been arrested at the suit of the plaintiff he was set at liberty, without any bail-bond having been taken.

Lord Chief Justice GIBBS.—If that be so, there is an end of the case; for though in *Allingham v. Flower* the defendant in the original action was suffered to go at large, that case is not very consistent with *Fuller v. Frest*, 7 T. R. 109, or with *Webb v. Matthew*, 1 B. & P. 225, in which the courts refused to suffer bail to justify, after the commencement of an action for an escape, where the sheriff had taken an undertaking for the defendant's appearance, instead of a bail-bond, without the plaintiff's concurrence. In the present case, the sheriff suffered *Bond* to go at large, as to the action at the suit of the plaintiff, without taking any bail-bond; and though he afterwards surrendered in the other actions, he still remained untouched as to that in question. The court is now desired to stay proceedings on payment of the costs already incurred, and to permit *Bond* to be now charged in this action. But how can we distinguish this case from those where the court has refused to permit bail to justify, because the sheriff has not earlier pursued his duty in taking a bail-bond? The right of action for an escape is as perfect in this case as in those I have alluded to; and the same reason for not granting this indulgence exists in the one as in the others.

The rest of the court concurred, observing that the present case was not to be distinguished from those of *Fuller v. Frest* and *Webb v. Matthew*.

Rule discharged.

*DOMVILLE, gent. demandant; KINDERLY, gent. tenant; [264
GEORGE, Earl of Coventry, vouchee.

Amendment of a recovery, "Of all tithes arising out of the premises in S., and in the parish of S.," by striking out the words "the premises in S. and in;"—the deed containing all the tithes in S.

Amendment refused, by striking out the aggregate sum of several rents, and inserting the different rents or sums of which it was composed.

*D'AGUILAR v. TOBIN.

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In an action on a policy, where the defendant, by the mistake of his witness, failed in producing the necessary document from the admiralty, for proving a breach of the convoy act, the court granted a new trial, in order to let him into this defence, after verdict found for the plaintiff on the merits.

THIS was an action on three policies of insurance on the ship *Samuel Cumming*, at and from *Jamaica* to *Trinidad di Cuba*, and from thence to her port of discharge in the united kingdom, warranted to sail from *Cuba* on or before the 1st of *August*, 1814. At the trial of the cause at *Guildhall*, at the sittings after last *Hilary* term, before Lord Chief Justice *Gibbs*, it appeared that the ship sailed from *Jamaica* without convoy on the 6th of *July*, 1814; arrived at *Trinidad* on the 10th; sailed from thence on the 1st of *August*, called at the *Havannah*, and was afterwards captured, in the course of her voyage to *England*, by an *American* privateer. It was objected for the defendant first that the captain had been guilty of a deviation in calling at the *Havannah*; but it appearing that he had done so for the purpose of seeking convoy, the Chief Justice held that, as he was acting for the benefit of the underwriters, he must be considered as their agent, and was, therefore, justified in so doing. Secondly, the defendant objected that the voyage from *Jamaica*, without convoy, or a license from the person authorised to grant licenses at *Jamaica*, was illegal; stat. 43 G. 3. c. 59, and *Darby v. Newton*, 2 Marsh. 252,—and called a clerk of the admiralty who stated that Admiral *Brown*, who then commanded on the *Jamaica* station, had authority to appoint, and had appointed, convoys and granted licenses. But the orders from the admiralty, under which Admiral *Brown* derived his authority, were not produced, and his Lordship considered that, without them, the proof of the admiral's authority was incomplete, and a verdict was accordingly found for the plaintiff.

Mr. Serjt. *Lens*, on a former day, obtained a rule to show cause why this verdict should not be set aside and a new trial granted, on an affidavit, which stated that the clerk of the admiralty had omitted, by mistake, to bring with him the necessary documents for proving Admiral *Brown's* authority, and also stating a letter from the secretary to the admiralty, informing the defendant that those documents should be produced on a second trial of the cause.

Mr. Serjt. *Best* now showed cause, and said that where a cause had been decided on its real merits, the court would not grant a new trial, for the purposes of letting in the underwriter to a defence, of which, in point of conscience, he ought not to avail himself. He cited *Gist v. Mason*, 1 T. R. 84, where,

the cause having been decided on the merits, the court refused to grant a new trial, in order to let the defendant into proof that the voyage was illegal; the illegality not appearing on the face of the policy.

Lord Chief Justice GIBBS.—We will confine the defendant to the point which he has raised; but in such a case as this cannot refuse to permit his going into this defence. The money should however be brought into court, because this is a defence which does not go to the merits. But [on its being urged that the money should be paid in all the actions,] only in the present action; for though there are circumstances under which we should direct the money to be paid into court in all the actions, yet where a defendant has been deprived by mistake of a part of his evidence, I think that is a condition which should not be imposed.

Per curiam.

Rule absolute, on payment of costs, and of the money into court.

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GUY, gent. one, &c. v. GOWER.

A., an attorney agrees to conduct a cause for B., for one hundred guineas, besides his taxed costs: if tried, A. to pay all expenses; if not, he was to receive the same sum; if tried, and a verdict against B., A. to have no demand on B. for costs.—*Held*, that, whether this agreement were legal or not, A. should have declared specially on it. But *quære*, both as to the legality and construction of such an agreement.

THIS was an action of *indebitatus assumpsit* for work and labor by the plaintiff as an attorney, in conducting an action for the defendant. The cause was tried at *Westminster*, at the sittings after last *Hilary* term, before Lord Chief Justice Gibbs, and the only question was on the following agreement, on which the plaintiff rested his case.—“*Croydon, June 14th, 1814.* It is this day agreed between Mr. Gower, and Mr. Guy as follows: Mr. Guy is to conduct the cause against Mrs. Bonnes for me, for which I agree to give him the sum of one hundred guineas, besides his taxed costs; it being understood that, if the cause is tried, Mr. Guy is to pay all expenses attending the same, and if not tried, he is to receive the same sum; the risk in the former case being considered equivalent to the benefit that may arise or occur from Mrs. Bonnes's settling the cause without going to trial. It is considered also that Mr. Guy is not to charge for the clerk's journey to *Tunbridge*, only such expenses as he incurred and paid to, or for, or on account of, the officer who arrested Mrs. Bonnes. And that in case the cause is tried and a verdict should go against Mr. Gower, that Mr. Guy is to have no demand on Mr. Gower for any costs.” It appeared that the present defendant had been nonsuited in the action mentioned in the agreement, which the Chief Justice considered as equivalent to a verdict going against him. In the present case, a verdict was found for the plaintiff, subject to the opinion of the court, *first*, whether he could recover at all on this agreement; and *secondly* whether, if he could, he should not have declared specially.

Mr. Serjt. Best, accordingly, having on a former day, obtained a rule *nisi* to set aside this verdict and enter a nonsuit.

Mr. Serjt. Vaughan, now showed cause. He admitted that the agreement appeared, at first sight, rather unintelligible; but said there was no difficulty in saying what was the intention of the parties; viz., that the defendant was to give a certain sum, and no more, whatever might be the event of the cause: he was purchasing of the plaintiff an indemnity from all costs, for one hundred

guineas, which might be considered in the light of a premium of insurance. On the other hand, the plaintiff was to receive one hundred guineas at all events, whether the cause were tried or not, and whether the present defendant succeeded or not; the risk of the cause going to trial, in which case he would have to pay all the costs, being set against the chance of profit which would arise to him from a compromise.—As to the second point, he contended that after an engagement of this sort had been entered into, and the work had been executed, the plaintiff might put aside the agreement, and recover on the common counts for work and labor. He cited *Leeds v. Burrows*,† where an agreement had been made between an outgoing and incoming tenant, that the latter should take the hay, &c., and be allowed the expense of repairs, the value of both to be settled by third persons; and it was held that the balance awarded to the out-going tenant might be recovered on the count for goods sold.

[The Chief Justice mentioned the following passage from *Com. Dig. tit. Attorney*, (B. 14.) “So an attorney ought not to prosecute an action to be paid in gross; for that will be champerty.” *Per Hob.* 117. *Box v. Barnaby*.]

Mr. Serjt. *Best*, *contra*, said that the opportunity which such an agreement would afford an attorney of deluding ignorant men, was a confirmation of the principle laid down in *Hobart*. But whether the agreement were legal or not, he contended that the meaning of it was, that if the defendant failed in his suit he was to pay nothing. Such contract should be construed, as if it had been the plaintiff's own deed, most strictly against himself. Then as to the mode of declaring, this was not like the case of a bargain executed, in which the plaintiff might recover on the general count, as where a builder undertook to build a house, and to be paid so much for each *item*. *Here*, a sum in gross was to be paid, to which the plaintiff could only entitle himself by means of the agreement, which ought, therefore, to have been set out specially.

Cur. adv. vult.

Lord Chief Justice GIBBS, now delivered the judgment of the court. It is unnecessary to say any thing, either on the legality or construction of this agreement; because we all think that, whatever be the construction of it, and whether it be valid or not, the plaintiff should have declared specially. There are many cases in which, after an agreement has been executed, the plaintiff may give it in evidence, and prove that he has performed his part of it, on the general counts. If a man undertake to build a house for a certain sum, and do build it, he may recover as for work and labor and materials found; and under that general description he may give the agreement in evidence. But this is a case of a peculiar sort. The plaintiff sues for work and labor done by him, as an attorney. Now the law has required certain things to be done, and certain rules to be observed, by him in that action. His bill must be delivered a certain time before he can bring his action to recover the amount of it, and during that time the bill is subject to taxation. In this case, the plaintiff seeks to recover on an agreement by which he would be exempted from all the rules, to which he would be subject in a common case of an action by an attorney against his client;—he delivers no bill, and the defendant, consequently, has no opportunity of taxing his claim. We do not think, therefore, that this falls within the common case of an action for work and labor. We do not say a word about the legality or construction of the agreement; it is sufficient to say that if it be legal, it is of a special nature, and to have been declared upon specially. Whatever, therefore, may be the event of another action, in another shape, this rule must be made

Absolute for a nonsuit.

† 12 *East*, 1. That case was decided on the ground that the plaintiff's claim was for goods sold, and that the agreement was only that the defendant's claim should be taken in part payment. See Mr. Justice *Le Blanc's* judgment.

TRINITY TERM, 56 GEO. III. 1814.

***BUTCHER v. KIERNAN.**

The court will not entertain a motion for judgment as in case of nonsuit, pending a demurrer.

MR. Serjt., *Pell*, showed for cause against a rule which had been obtained by Mr. Serjt., *Copley*, for judgment as in case of a nonsuit, that the defendant had pleaded first *non assumpsit*, and secondly, a special plea to the whole declaration; that the plaintiff had demurred to the special plea, but no *concilium* had been demanded on either side; and, therefore, that if the plaintiff had gone to trial on the issue in fact, the verdict would not have been conclusive, *Tidd* 744, 5, 6, 5th edit., as to which of the issues, of law or of fact, should be first determined. *Semble*, the former.

But the court asked whether this motion could be entertained at all, pending a demurrer, and Mr. Serjt., *Copley*, admitted that it could not, because the plaintiff had a day in court till the demurrer was argued.

Per curiam.

Rule discharged.

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***TOOD v. ETHERINGTON.**

Bail may justify at any time before execution issues; though final judgment have been signed.

MR. Serjt., *Copley*, objected to the justification of the bail in this case, on the ground that final judgment had been signed; and that bail could only justify *pendente lite*.

Mr. Serjt., *Pell*, *contra*, said that bail might justify at any time before execution issued, to which the officers of the court assented.—And the court observing that the act of justification would not operate to the prejudice of the plaintiff.

The bail justified.

MICHAELMAS TERM, 57 GEO. III. 1816.

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***SILVA v. LINDER, et al.**

Three underwriters, on a representation of a loss, pay their subscriptions, amounting to 600*l.*, into the hands of the broker, who, by their joint authority, pays over 300*l.* The loss turns out to be fraudulent, and one of the underwriters brings an action against the broker, to recover back his 200*l.*—*Held*, that the broker was entitled to set off the

300*l.* paid over, against this demand, and that the court could not enter into the account to see what each party was entitled to, respectively: And, therefore, either that the other underwriters should have joined in the action, or the plaintiff should have resorted to a court of equity.

THIS was an action to recover the sum of 200*l.*, for money had and received, being the amount of the plaintiff's subscription to a policy of insurance from *London to Pernambuco*, on goods on board the *Maria*, and was brought against the brokers who effected the policy, on the ground that the money had been paid through a fraudulent misrepresentation of the loss. The cause was tried before Lord C. J. *Gibbs*, at *Guildhall*, at the sittings after last *Trinity* term, when the plaintiff established a case of fraud on the part of *Lazarus* and *Coben*, the assured, which the brokers answered by proving that they had paid over 300*l.*, out of the moneys received from the underwriters on this policy, with the consent and by the joint direction of the different parties interested. The plaintiff then proved that 200*l.* had been paid by another underwriter, and 188*l.* by a third; so that the defendants had received 588*l.* in the whole, of which they had paid over 300*l.*; consequently, 288*l.* remained in their hands, to which, it was contended, the underwriters, who had paid, were entitled *pro rata*. The *Chief Justice*, however, was of opinion that this was a question of account, which could not be gone into in a court of law; that the defendant had a right to say that it was the plaintiff's money, which he had paid over, and that this was an answer to the action; the plaintiff was accordingly nonsuited.

The *Solicitor-General*, now moved that this non-suit should be set aside, and a new trial granted. He contended that there was nothing in the transaction, which rendered it incapable of being settled in a court of law. If the defendants had not paid over any thing, it was clear that the plaintiff, and each of the other underwriters, would have been entitled to recover his specific sum. The defendants had not paid out of the money of any underwriter in particular; but out of the aggregate of the sums which they had received. It was, therefore, nothing more than the common case of a person paying money into the hands of his agent, and afterwards claiming to recover so much as the agent had not paid over. The defendants would have an equal right to set it off against the claim of any other underwriter, for there was no reason why the plaintiff should be the only sufferer. It was no answer, to say that an account must be taken between the parties, provided the account could be got at by a simple calculation. Then it was for the defendants to say, to what extent they had paid over the plaintiff's money, and the plaintiff's claim must abate proportionably; but it was not altogether destroyed.

Lord Chief Justice *GIBBS*.—The plaintiff in this case had paid 200*l.* out of 588*l.*; I consider that the defendants proved a distinct set off, to more than the amount of the former sum, and I decided on that apprehension. It is clear that the plaintiff is not entitled to recover the whole of his subscription, because that sum, together with those paid by the other underwriters, was thrown into one mass, out of which a certain sum was paid over, which must be deducted from the present demand, as well as from those of the other underwriters. It is, however, contended that each must be allowed *pro rata*; but that is a question for a court of equity, because a court of law cannot go into the account, in order to ascertain what each party is entitled to. The defendant, receiving the different sums, was a mere agent; and as, by the nature of the transaction, the case of all the principals was united, they should all have joined in the action. But it is attempted to solve the difficulty, by saying that the defendant must prove how much of each sum he had paid over, and then allow *pro rata*. But, as I conceive, when it appears that more than the plaintiff's demand has been paid over, there is an end to the action *at law*.—At law, the defendant has a right to say that he had nothing to do with any one but the plaintiff: Either, therefore, the plaintiff should have had recourse to equity, or the other underwriters should have been joined.

Mr. Justice DALLAS.—The facts of the case are, that the plaintiff was an underwriter on a policy which was effected by the defendants, as brokers. A loss is claimed; the amount of different subscriptions is paid into the hands of the defendants, out of which the sum of 300*l.* is paid over by the consent of all parties, of which the plaintiff is one. The loss afterwards turns out to be fraudulent, and the plaintiff contends that he is entitled to recover the amount of his subscription, which is 200*l.* The sum which has been paid over is, however, more than sufficient to cover his demand; and I therefore concur with his Lordship, in thinking that this action cannot be sustained in a court of law.

Mr. Justice PARK.—As the *Solicitor-General* stated the case, it would be the common case of an action for money paid to an agent, which he had not paid over. But this is the case of money paid by joint authority. There must either be a joint action, or else the court must make an appointment, which we cannot do, because the parties are not before us; we know nothing of them. It is therefore a case for equitable jurisdiction only, and not for a court of law.

Mr. Justice BURROUGH, concurred.

Rule refused.

IN THE EXCHEQUER CHAMBER.

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*THE KING v. TOWLE.

Indictment on stat. 43 *G. 3. c. 58*. The *first* count states that *A.*, with a certain pistol, feloniously, wilfully, maliciously and unlawfully, did shoot at *D.*, with intent, feloniously, wilfully, and of his malice aforethought, to kill and murder him; and that *B.* and *C.* were aiding and abetting *A.* Another count states that an unknown person feloniously, wilfully, maliciously, and unlawfully, did shoot at *D.*, with intent, feloniously, wilfully, and of his malice aforethought, to kill and murder him; and that *A.*, *B.*, and *C.* were aiding and abetting the said unknown person the felony aforesaid, in manner and form aforesaid, to do and commit; and were then and there knowing of and privy to the committing of the said felony; without alleging that they were *feloniously* present, aiding, &c. The jury acquitted *B.* and *C.* and found *A.* guilty generally; but afterwards added that he was not the person who fired the pistol.—Held, that *A.* was well convicted on this indictment.

THIS was an indictment on stat. 43 *G. 3. c. 58* † and the *first* count stated

† By that statute it is enacted, that "If any person shall wilfully, maliciously, and unlawfully, shoot at any of his Majesty's subjects, or present, point, or level any kind of loaded fire-arms, and attempt, by drawing a trigger, or in any other manner, to discharge the same at any of his Majesty's subjects, or shall wilfully, &c. stab or cut any of his Majesty's subjects, with intent to murder, rob, maim, disfigure, or disable them, or to do some other grievous bodily harm to them, or to obstruct, resist or prevent the lawful apprehension and detainer of persons so stabbing or cutting, or their accomplices; or shall administer, or cause to be administered, any poison, &c. with intent to murder any of his Majesty's subjects, or to procure the miscarriage of any woman, being quick with child; or shall wilfully, &c. set fire to any house, out-house, &c., the person or persons so offending, *their counsellors, aiders, and abettors, knowing of and privy to such offence*, are declared to be felons, and shall suffer death as in cases of felony, without benefit of clergy.—Provided that, if it shall appear on the trial of any person indicted for the wilfully, &c. shooting, or presenting loaded fire-arms, and attempting to discharge the same at any of his Majesty's subjects, or for the wilfully, &c., stabbing or cutting them with such intent as aforesaid, that such acts of stabbing or cutting [not mentioning shooting, &c.] were committed under such circumstances, as that if death had ensued therefrom, the same would not have amounted to murder, the persons so indicted shall be acquitted."—*Quare*, whether this proviso extends to the discharging of fire-arms?

that *James Towle*, on the 28th of *June*, 56 *G. 3.*, with force and arms, at the parish of *Loughborough*, in the county of *Leicester*, with a certain pistol, loaded, &c., which he then and there had and held, feloniously, wilfully, maliciously, and unlawfully, did shoot at *John Asher*, with intent, in so doing, feloniously, wilfully, and of his malice aforethought, to kill and murder the said *J. A.*: And that *Benjamin Badder*, and *John Slater*, were then and there present, aiding and abetting the said *J. Towle*, the felony aforesaid, in manner and form aforesaid to do and commit, and were knowing of and privy to the committing of the said felony, against the form of the statute, &c. &c. The second count alleged that the act was committed with intent to disable the said *J. Asher*; and the third count, with intent to do him some grievous bodily harm.—The fourth count alleged that an evil-disposed person, unknown, on the day and year aforesaid, with a certain other pistol, loaded, &c., feloniously, wilfully, maliciously and unlawfully, did shoot at the said *J. Asher*, with intent in so doing feloniously, wilfully, and of his malice aforethought, to kill and murder the said *J. A.*: And that the said *James Towle*, *B. B.*, and *J. S.* were then and there present, aiding and abetting the said unknown person, the felony aforesaid, in manner and form aforesaid, to do and commit; and were then and there knowing of and privy to the committing of the said felony, against the form of the statute, &c. The fifth and sixth counts varied from the fourth, in like manner as the second and third from the first.

The prisoners were tried before *Mr. Baron Graham*, at the last assizes at *Leicester*, when the jury acquitted *Badder*, and *Slater*, and found *Towle*, guilty, generally. The learned judge then put it to the jury whether *Towle*, was the man who fired, and they found that he was not.† It was then objected that the three last counts of the indictment were bad, for not alleging that the prisoners were feloniously present, aiding and abetting; and that no judgment could be entered up on the three first counts, because the jury had found that *Towle's* was not the hand which fired.—Judgment was passed on the prisoner, but his execution was respite till the opinion of the twelve judges should be taken. The case now came on for argument.‡

Mr. *Denman*, was heard on behalf of the prisoner. As to the three last counts, he contended that the word "*feloniously*" was essential in all cases of felony, in order to show the intent with which the act was committed; and that no other words could supply its place:—"Wilfully and knowingly" were insufficient substitutes, because it was doubtful to what the *will* and *knowledge* might refer. In almost all cases of felony, it was possible that all the facts alleged might be true, and yet no felony have been committed. Suppose a constable were abusing his authority, and were to call upon *A.* to assist him,—which *A.* would certainly be bound to do,—and death were to ensue; the constable would be guilty of murder, but *A.* would not; and yet *A.* would be aiding and abetting an act which was felony in the constable, but he would not be privy to what was passing in the mind of the constable, and which gave the act its felonious color. [Lord *Ellenborough*. Here, the prisoner is alleged to have been "privy to the committing of the felony;" which includes the motives under which it was committed.] That was going beyond the general decisions of the judges in cases of felony, particularly where the offence was made felony by statute. But though it should be said that this indictment could not be true, unless felony had been committed, still the technical words, which the law had

† There appeared to be some doubt whether this question had been put to the jury on the part of the crown, or on that of the prisoner; the judges, however, considered it as quite immaterial, and said that they should treat the question as if the jury had found a special verdict, that the prisoner had not fired, but was present, aiding and abetting.

‡ This case is inserted at greater length than, perhaps, would at first sight be thought necessary; but the editor thinks himself justified, by the importance of the case, in giving the arguments very fully; and he is unwilling, as no formal judgment is given on these occasions, to omit any of the observations interposed by the court.—*Mr. Baron Wood* was absent from indisposition.

introduced for the protection of life, could never be dispensed with. In 2 *Hale* P. C. c. 25. s. 7, it was laid down "That the offence itself must be alleged, and the manner of it. An indictment of *felony* must always allege the act to be done *felonice*; an indictment of burglary, *quod felonice et burglariter fragit et intravit*; an offence of high treason, *proditorie*; petit treason, *felonice et proditorie*:—*A.* is indicted, *quod furatus est unum equum*; it is but a trespass, for want of the word *felonice*:" And Lord *Hale*, cites *Stamf. P. C. p. 96. a.* Again in 2 *Hale*, P. C. c. 24. s. 1; "If the words be words of art, and by omission or misplacing of letters, become insignificant, they vitiate the indictment; as, *burgariter* for *burglariter*, *feloniter*, for *felonice*, &c.;" which showed the importance of them. So *Stamf. P. C. 94. b.* In 2 *Hawkins*, P. C. c. 25. s. 53; "No periphrasis or circumlocution whatsoever will supply those words of art, which the law has appropriated for the description of the offence; as *murdravit* in an indictment of murder; *cepit*, of larceny; *may hemiavit*, of maim; *felonice*, in an indictment of any felony whatever, &c." [Lord *Ellenborough*. This will not be disputed; but it will be contended that the word "*feloniously*" is inserted, and without any periphrasis; because the unknown person is said to have done it *feloniously*, and the prisoner is then alleged to have been present, aiding and abetting the unknown person to commit the said *felony* in manner and form aforesaid, and to have been knowing of and privy to the committing of the said *felony*.] That would require an ingenuity of construction which had never been admitted in criminal cases; and as to calling in aid the former words, it would not be sufficient, in an indictment against a receiver of stolen goods, to refer to the felonious act of stealing, without also stating that they were received *feloniously*. [Mr. Justice *Bayley*. You do not cite any authority for that?] But the precedents were uniform and unvarying on that point. In 2 *Hawkins*, P. C. c. 29, s. 17, "It doth not seem necessary in any indictment or appeal against a man, as accessory before the fact, to set forth the special manner by which he abetted it, but only to charge him generally, *quod FELONICE, &c. abettavit, &c.*"—Supposing, then, the three *last* counts to be bad, the prisoner, he contended, could not be convicted on the three *first*, because he was there charged with *shooting*, and the jury had expressly found that he did not shoot. In many cases, a party aiding and abetting might be said to be a principal, and be charged as doing the act; but then the facts should be expressly found by the jury, as in *Wells's* case, 1 East P. C. 414. cited in *Starkie*, on Criminal Pleading 400. He also cited *The King v. Borthwick*, Doug. 207, and the *The King v. Francis*, Str. 1015, to the same point. The offences created by this statute were essentially distinct, though the punishment was the same. It might perhaps be answered, in the words of Mr. Justice *Foster*, *Foster's C. L.* 351, 3d edition, that in the case of murder, the stroke of one was the stroke of all, the person actually striking being only the hand or instrument by which the others struck; and that even if *A.* were indicted for giving the wound, and *B.* and *C.* for aiding and abetting, and the evidence were that *B.* gave the wound, and that *A.* and *C.* were aiding, the proof would sustain the indictment. But *there* a life had been lost, and besides, the principle of the common law applied; here, no life had been lost, and the common law superseded by the statute, by which alone the felony was created, and which was the entire code on the subject; the statute must therefore be strictly followed, and the charge precisely proved: Otherwise, a man might not know what he was called upon to answer.—The decisions on the statute of *stabbing*, 1 Jac. 1. c. 8. were in point, but still stronger; for the offence there described was felony without clergy at common law; yet, as clergy was only taken away from those who actually inflicted the wound, aiders and abettors had their clergy allowed: *The King v. Page*, and *Harwood*, Aleyn, 43, *Stylos*, 86. Aiders and abettors in that case, not being mentioned in stat. 1 Jac. 1. c. 8. were much in the same situation as aiders and abettors who were not charged in the words of this statute; or rather, the latter were in a better situation; inasmuch

as they had not been called on to answer by a charge following the words of the statute, by which alone they were amenable to the law as felons. [Lord C. J. *Gibbs*. The stat. 1 Jac. 1. c. 8, was passed against the very hand which struck the blow; by the statute now under consideration, all counsellors, aiders and abettors of the crime, though not actually present, are made felons, and no mention is made of those who are present; which excludes the argument which you would draw from the former act.] If accessaries before the fact were to be considered as principals, they would be ignorant of the charge alleged against them; they might have a good defence as to being present, but not as to counselling, &c. The act now in question bore a strong analogy to stat. 3 Hen. 7. c. 2, *de muliere abducta* by which "not only the takers, but procurers, abettors of the felony, and receivers of the women, knowing the same, are all adjudged principal felons; the like whereof we find not in any other statute:" 3 Inst. 61. Yet, though all were principals, the forms of indictment always described the fact as it actually occurred.† The greatest injustice might be worked, by convicting accessaries before the fact on a charge as principals; because their defence might rest on quite a different footing. The same observation applied to the *Coventry* act.‡ the language of which was closely followed by the statute now in question; the indictment always alleged that one party cut, &c., and that the others aided and abetted;—it did not charge all generally, but each with committing his respective crime. By the Black Act, 9 G. 1. c. 22, persons maliciously shooting, were made felons without benefit of clergy; in *The Coalheavers' case*,§ it was held that aiders and abettors might be found guilty as principals; but that statute was silent as to them, and the common law took its course; here, the common law was superseded by the statute which had created the offence, and described the punishment: Indeed it has been questioned by Mr. J. *Foster*, in *Midwinter* and *Sims' case*,|| whether that statute could be extended to aiders and abettors, so as to oust them of their clergy.

Mr. *Reynolds*, for the crown, contended as to the three last counts, that each of them must be taken as one entire count, uniting the former part, in which the word *feloniously* occurred, with the latter in which it did not. In the case of the constable, put by the other side, the person assisting him would not be *wilfully* aiding and abetting the commission of the felony, because the consenting mind would be wanting; but that could not be said here, because the indictment alleged "that the prisoner was present, aiding and abetting the unknown person the *felony aforesaid*, in manner and form aforesaid, to commit, and was privy to the committing of the *said felony*;" which connected the latter with the former clause. The word "*feloniously*," it was true, was to be found in most precedents of indictments for felony; but the question of its necessity arose from the particular case. He cited to this point, *Heyden's case*, 4 Co. 41, where the coroner's inquest found that *Jacobus Heyden*, and several others, *ex malitiis suis præcogitatus, felonice in Edwardum Savage insultum et affraim, et quod Heyden cum quodam gladio præfatum Savage felonice percussit, et dedit eidem Edwardo adtunc et ibidem unam plagam mortalem*, &c.; it was objected that the indictment did not say that *Heyden felonice, et ex malitia sua præcogitata, dedit plagam*, &c.; but the objection was disallowed, because the conjunction "*et*," coupled the sentences together, so that the words "*felonice*," &c., first mentioned, referred to all the subsequent verbs. So in *Mary Nicholson's case*, 1 East, P. C. 346. There was, therefore, sufficient to support the last three counts.—The main point, however, was that, on the finding of the jury, *Towle* must be considered, in point of law, to have fired the pistol, and therefore, was a principal in the first degree. The

† See the precedents in *Chitty* on Criminal Law, *Starkie* on Criminal Pleading, Trem P. C. 34. *Svensden's case*, St. Tri. vol. 5. p. 450, *Fulwoods case*, Cro. Car. 482.

‡ 22 and 23 Car. 2. c. 1. s. 7. See *Chitty* on Criminal Law, 787; *Leach's C. L. Pas-sim*, *Coke*, and *Woodburne's case*, St. Tri. 6 vol. Appendix, 59.

§ *Leach's C. L.* 64, 4th edition.

|| *Foster's C. L.* 415, 3d edition.

verdict was to be taken as a general verdict of *guilty*, and was not affected by a circumstance which the jury had added, and which was wholly immaterial in point of law. In 2 *Hawkins*, P. C. c. 23, of *Appeals*, sect. 19, "It is in the election of the plaintiff, to declare against him who actually gave the wound, as the principal offender, and against those who abetted him, as accessaries; or, against all, as principals." So in sect. 76 of the same chapter, "the plaintiff may either suppose in his declaration that every one of them did the fact, because in such a case the act of one was, in judgment of law, the act of all; or show the special manner of the case, as in truth it was, &c." So in an appeal of *Benson v. Offley*, and *Leppen*, 3 Mod. 121; 2 Show. 510, S. C., and there was no distinction between appeals and indictments; the same precision was to be observed in each. The same point was laid down in 1 Hale, 437, *Mackalleys's* case, 9 Co. 67. *Gibson's* case, 1 East, P. C. 413; and in *Plowden*, 98, where this doctrine, and the reasons of it, are fully considered; so that it was immaterial on this verdict, whether he were charged with actually firing the pistol, or with being present, aiding and abetting. It was not necessary that the allegation should be strictly according to the *fact*; it was sufficient if it satisfied the *legal* requisites. *Wells's* case was rather against the prisoner than in his favor; because it confirmed the case of the *Coalheavers*, and showed that a principal in the second degree might be indicted in the first degree. The doubts entertained by Mr. Justice *Foster*, in *Midwinter* and *Sims's* case, arose from the omission of *aiders* and *abettors* in the *Black act*; but they were expressly included in the statute now under consideration. As to the alleged ignorance of the prisoner of the charge which he was called upon to answer, every one was presumed to be aware of the situation in which the law placed him.

Mr. *Denman*, in reply, as to the three last counts, said that in *Heyden's* case, the word *felonice* ran through the whole sentence; and so in *Nicholson's* case: Whereas here, there was a break in the sense which prevented that word from being applied to the subsequent clause. As to the three first counts, he recapitulated his former arguments.

The prisoner was afterwards executed, without further respite.

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*LAST v. BENTON.

Where money is paid into court upon the common rule, the court will not discharge that part of it which directs the payment of costs, unless the defendant have been prevented from making a legal tender, by the fraud or vexatious conduct of the plaintiff: Therefore, they refused the application, where the defendant had merely pulled out his pocket book, for the purpose of making a tender, six weeks before action brought, and was prevented by the plaintiff walking away; never having repeated the offer.

THIS action was brought to recover the sum of 7*l.* 15*s.* 10*d.*, and the defendant, having paid 7*l.* into court upon the common rule obtained a rule in last *Trinity* term, calling on the plaintiff to show cause, why so much of the former rule as related to the payment of the plaintiff's costs should not be discharged, and why the plaintiff should not pay to the defendant the costs of the suit, in case he should consent to take out of court the money paid in, in full discharge of the action, with the costs of this application. There had been some dispute as to the amount of the debt, and the defendant's affidavit stated that he had sent for the plaintiff to a public house, and on his arrival had taken out his pocket book, in order to tender to him 7*l.*, on which the plaintiff said, "If that is what you sent for me for, I am off," and walked away, This, however, was

six weeks before action brought, and there appeared to have been nothing to prevent his making a regular tender afterwards.

Mr. Serjt. *Blosset*, was now to have shown cause, but the court, observing that if this were a tender the defendant might have pleaded it; and that if not, he had had plenty of time to have made a legal tender, called on the defendant to support the rule.

Mr. Serjt. *Best*, accordingly, contended that where a defendant had done every thing in his power to make a tender, and had been prevented, the costs ought not to be cast upon him. He cited *Johnson v. Houlditch*, 1 Burr. 578, where this motion was made.

Lord Chief Justice GIBBS.—I agree that where a defendant is prevented, by the fraud or vexatious conduct of the plaintiff, from entitling himself to the defence with which a tender would furnish him, he ought to be placed in the same situation as if he had made a legal tender. But where he might have made a regular tender, and has not done so, it is better to leave it to the regular course. One of the cases in this court, *Zeeven v. Cowell*, 2 Taunt. 203, (see also *Roberts v. Lambert*, *ibid.* 283,) went on the representation made of the practice in the King's Bench, which afterwards appeared to be unfounded. *Burmester v. Hilch*, 13 East, 551, cited in *Gibbon v. Copeman*, 1 Marsh. 392, *quod vide*. In the present case, the defendant, six weeks before action brought, takes out his pocket book, for the purpose, as he says, of making a tender; but there was nothing to prevent his making a legal tender afterwards; instead of which he never takes any step towards it, but makes this application out of the course of the cause. Although, therefore, I do not say that there are not cases in which the court would interfere, and consider an *offer* of this sort the same as a regular tender, I do not think that this is such a case. Mr. Justice *Le Blanc*, in *Burmester v. Hilch*, states the great inconvenience which would arise from the interference of the court, unless a strong case were made out of intentional vexation on the part of the plaintiff.

The rest of the court concurred.

Rule discharged with costs.

*GREEN v. GREENBANK.

[*485]

Where the substantial ground of action is *contract*, the plaintiffs cannot, by declaring in *tort*, render a person liable who would not have been liable on his promise: Therefore, where the plaintiff declared that, having agreed to exchange mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c.; *held*, that *infancy* was a good plea in bar.

THIS was a special action on the case, and the *first* count of the declaration stated, That the plaintiff had bargained with the defendant to deliver to him a mare of the plaintiff, by him warranted sound, except as to one of her eyes, and also to pay the defendant 5*l.* in exchange for a mare of the defendant; and the defendant, *by falsely warranting his mare to be sound*, exchanged her for that of the plaintiff, who paid the defendant 5*l.* for the said exchange, whereas the defendant's mare, at the time of the said exchange, was unsound; by means of which the defendant *falsely and fraudulently deceived* the plaintiff in the said exchange, and thereby the said mare of the defendant became of no use to the plaintiff, &c. The *second* count stated that the defendant, at the time of the exchange, *well knew* that his mare was unsound. The defendant pleaded *first*, not guilty, *secondly*, that, at the time of the alleged exchanges and warranties, the defendant was an infant, under the age of

twenty-one years. The plaintiff demurred generally to the plea of infancy, the defendant joined in demurrer, and the case now came on for argument.

Mr. Serjt. *Vaughan*, who was to have argued in support of the demurrer, admitted that unless the court should think that the present case was distinguishable from those which had been decided on the subject, there must be judgment for the defendant; and he mentioned *Jenning v. Rundall*, 8 T. R. 395, where it was decided that a plaintiff could not convert an action founded on contract, into tort, so as to charge an infant; and *Weall v. King*, 12 East, 542, where it was held that a declaration in case, alleging a deceit by means of a warranty made by two defendants on a joint sale, was not supported by proof of a contract of sale and warranty by one only,—the action, though laid in tort, being founded on the joint contract alleged; and so in *Powell v. Layton*, 2 N. R. 365. The only question was, whether the allegation in the second count, that the defendant *well knew* his mare to be unsound, varied the case.

Lord Chief Justice GIBBS.—The cases which have been alluded to clearly show that, where the substantial ground of action rests on promises, the plaintiff cannot by changing the form of action, render a person liable who would not have been liable on his promise. This is a case in which the *assumpsit* is clearly the foundation of the action; for it is, in fact, an *undertaking* that the horse was sound. There is another very strong case in Rol. Ab. Action sur Case, D. 3; *Cross v. Androes*, that an infant is not liable on the custom of the realm, for the loss of goods committed to his care as an innkeeper. That case was recognized by Lord C. J. *Holt*, in the case of a bill of exchange, *Williams v. Harrison*, Carth. 160, where it was contended that infancy was no plea to an action founded on the custom of merchants; the court held the plea good, Lord *Holt*, observing that the former case was still stronger. With respect to the allegation in the *second* count, that does not vary the case from that of *Weall v. King*, because the deceit was practised in the course of the contract.

The rest of the court concurred.

Judgment for the defendant.†

Mr. Serjt. *Copley* was to have argued in support of the plea.

† See also *Johanson v. Pie*, 1 Keble, 905. 913.

IN THE EXCHEQUER CHAMBER.

*561] *GRAHAM et al. Assignees of LEIGH, a Bankrupt, v. RUSSELL.

Where an insured, being indebted to the underwriter on a balance of accounts, becomes bankrupt, if a loss afterwards happen, the underwriter, in an action by the assignees, may deduct the balance due to him from the amount of his subscription.

IN THE EXCHEQUER CHAMBER.

*The KING v. JOHN DANNELLY, and GEORGE VAUGHAN.

A. is indicted for a burglary, and *B.* as accessory both before and after the fact. The facts proved are, that *A.*, at the instigation of *B.*, a police officer, consents with three others to commit a burglary, and it is agreed that *B.* shall lie in wait to apprehend the three others, and that the reward for their conviction shall be shared between *A.* and *B.*—The jury find *A.* guilty of larceny only, and *B.* as accessory both before and after.—*Quære*, 1st, whether, as *A.* was not to participate in the plunder, but only in the reward, he could be convicted of larceny,—2dly, whether, as *A.*, the principal, had been acquitted of the burglary, *B.* could be convicted as accessory to the larceny?

THIS indictment alleged that *John Dannelly*, late of the parish of *St. George Bloomsbury*, in the county of *Middlesex*, laborer, on the 15th of *December*, 56 G. 3, about the hour of six in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling house of one *J. Poole*, there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said *J. Poole*, in the said dwelling house, then and there being, then and there feloniously and burglariously to steal, take, and carry away; and then and there, in the same dwelling house, with force and arms, thirty yards of woollen cloth, of the value of 5*l.* of the goods and chattels of the said *J. Poole*, in the same dwelling house then and there being found, then and there feloniously and burglariously did steal, take, and carry away, against the peace, &c.: And that *George Vaughan*, late of the parish aforesaid, &c., laborer, before the said felony and burglary was committed in form aforesaid, viz. on the day and year aforesaid, with force and arms, at, &c., did unlawfully and feloniously counsel, aid, abet, and procure, the said *John Dannelly* to do and commit the said felony and burglary, in manner and form aforesaid, against the peace, &c.: And that after the said felony and burglary was done and committed by the said *J. Dannelly*, in manner and form aforesaid, the said *G. Vaughan*, well knowing the said *J. Dannelly* to have done and committed the said felony and burglary in form aforesaid, on the 16th of *December*, in the fifty-sixth year aforesaid, with force and arms, at, &c., him the said *J. Dannelly* did feloniously receive, harbor, in manner and form aforesaid, against the peace, &c.—The prisoners were tried at the *Old Bailey*, on the 24th of *September* last, when it appeared that the prisoner, *Dannelly*, at the instigation of *Vaughan*, who was in the employment of the police office, *Bow Street*, had concerted with three other men, *Batts*, *Rawley*, and *Farthing*, to rob the shop of *Mr. Poole*, in *Everett Street*, *Brunswick Square*, on the night of the 15th of *December*, 1815; that it was agreed that *Vaughan*, and another officer, should lie in wait to apprehend *Batts*, *Rawley*, and *Farthing*, and that the reward for their conviction, being 40*l.*, each, in case of burglary, should be divided between them; that *Vaughan* told *Poole* that his house would be robbed that night, and desired him to mark a piece of cloth and leave it on the counter; to take care to fasten the latch of his door, and to make no resistance, assuring him that he should lose nothing; that *Poole* consented to the plan, and left the house with *Vaughan* and *Barrett*, the other officer, to watch; that accordingly, *Dannelly*, and the three others, stole three pieces of broadcloth, but not that which had not been marked by *Poole*; and that *Batts*, *Rawley*, and *Farthing*, were apprehended and tried for the burglary, of which offence they were acquitted, it appearing to have been not quite dark, but were convicted of grand larceny. On the present indictment, the jury acquitted *Dannelly* of the burglary, but found him guilty of stealing in the dwelling house to the value laid in the indictment; and they found *Vaughan* guilty as accessory,

both before and after. It was then objected, on the part of *Vaughan*, that as the jury had acquitted the principal of the burglary, the accessory must be acquitted altogether. The point was reserved for the consideration of the twelve judges. Mr. Baron *Graham*, in summing up the evidence, also intimated a doubt, whether *Dannelly*, could be convicted of larceny, since he was not to partake of the stolen property; the reward on the conviction of his accomplices being his only inducement.

Mr. *Curwood*, who was of counsel for *Vaughan* only, at the trial, had been requested by the judges to consider also the question as to the legality of *Dannelly's* conviction; and he accordingly now contended, *first*, that *Dannelly* had not committed larceny; and *secondly*, that even if he had, his acquittal of the burglary acted as an *entire* acquittal of *Vaughan*. As to the *first* point, a crime must consist both of the fact, and of the intention; each of which, the law had said, must be a component part of it. *Puffendorf*, lib. 1. c. 7, s. 4. Then what was necessary to constitute larceny, according to the *English* law? Mr. Justice *Blackstone*, vol. 4. c. 17. had defined it to be "the felonious taking, and carrying away, of the personal goods of another:"—That however, was a very imperfect definition; for "felonious taking" was a compound idea, and it was necessary to have a definition of that also. To go back to the first authorities: According to *Bracton*, lib. 3. c. 32, *De Corona*. *Purtum est contrectatio rei alienæ fraudulentæ, cum animo furandi, invito illo domino cujus res illa fuerit; cum animo dico, quia, sine animo furandi, non committitur*. This definition was borrowed from that of the civil law: *Furtum est contrectatio fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessionisve*, Just. Inst. lib. 4tus; tit. 1. *De obligationibus quæ ex delicto nascuntur*. § 1. *Definitio, furti*, which was going farther than the *English* law, because it made the taking the *use* of a thing as criminal as taking the thing itself;—but by the civil law also, *furtum, sine affectu furandi, non committitur*, *Ibid.* sect. 7. *De affectu furandi*. This definition had been recognised by all the writers on the subject; who had universally considered that the *animus furandi* was essential, *Staundf.* 24. 3 *Inst.* c. 47. 1 *Hawk.* c. 33, s. 1. 1 *Hale*, c. 43, p. 504. *Foster* P. C. 123. *East*, P. C. 553. In the present case, this necessary ingredient was wanting; for *Dannelly*, was not present with the *animus furandi*; his object was not to participate in the plunder, but to get a share of the reward on conviction. It might be said that though his was not the hand which took the property, he was still *particeps* of the guilt; but there must be a community of *intention* to constitute a community of guilt. In the case of three soldiers, *Foster of Accomplices*, c. 1, p. 353, 3d edit. who went to rob an orchard, two of them got into a tree, the third stood at the gate with his sword drawn, and killed the owner's son who had collared him: Lord *Holt*, held, that it was murder in him, but that the other two were innocent; because they had not all come with a *general resolution* against all opposers; that is, the community of intention did not extend to all. He cited, as closely applicable, the case of *M'Daniel*, and others, 10 St. Tri. 417. *Foster*, 121, who were indicted as accessories before the fact to a robbery committed on *Salmon*, one of the prisoners; and it was held that no robbery was committed, because, *Salmon*, having consented to part with his property, it could not be said to have been taken *invito domino*. So here, there was no larceny, because the *animus furandi* was wanting.—*Secondly*, supposing *Dannelly*, to have been well convicted as principal, still *Vaughan*, as accessory, must be acquitted. An accessory must be convicted of a felony of the same species as the principal. Now burglary and larceny were as distinct offences, as forgery and murder. By the old law, the accessory could not be indicted till the principal have been convicted; and in the present case, if *Dannelly* and *Vaughan*, had been indicted separately, and the indictment against the latter had stated that the principal had been acquitted, the accessory could not have been convicted.

Mr. *Bolland*, for the crown, contended that there was nothing to impugn the

verdict, either as to the principal, or as to the accessory. *First*, taking the definition of larceny as given by any *English* lawyer, he contended that *Dannelly*, had been guilty of that offence. In *M' Daniel's* case, *Salmon*, had consented to part with his property; but *here*, *Poole* had only facilitated the robbery, without any intention to part with his property; indeed, the cloth which he had marked for the purpose of being taken away was not touched. The present case rather resembled that of *Eggington*, East, P. C. 494. 666. where the owner of the goods directed his servant to carry on the plot into which he had entered with the robbers, and to let them into the house, where they broke open inner apartments and took the goods; and all the judges, except Mr Justice *Lawrence*, who doubted whether it could be said to be done *inrito domino*, held that it was larceny. So in the case of *Norden*, Foster, 129, East, P. C. 666. who went out for the purpose of being robbed; and after delivering his money, apprehended the felon, who was convicted. *M' Daniel's* case was one which mainly supported the present prosecution; for "the judges were unanimously of opinion that, supposing a robbery to have been committed on *Salmon*, the facts found by the special verdict were sufficient to charge *M' Daniel*, &c. as accessories," Foster, 124. There was the same connection between *Vaughan*, and the principals in the present case. Then, as to the other requisite of larceny, the *animus furandi*, no doubt *Dannelly*, meant to blend the two characters of thief and informer; and to have his share in the plunder, though he had an ulterior object in view. *Secondly*, as to the prisoner *Vaughan*, it was every day's practice to indict a person as accessory to a burglary, and if the principal were convicted of larceny only, it was no objection to the conviction of the accessory. *Vaughan*, had concerted with *Dannelly*, to commit an offence, which comprised other offences. He had directed *Poole*, to latch his door, in order to make it burglary. Then, because the offence had fallen down to larceny, could it be said that *Vaughan*, was not equally an accessory? [Lord *Ellenborough*. To be sure, a man who is charged with an offence is also charged with all the offences of which it is composed.]

Mr. *Curwood*, in reply, said that as to the *first* point, he had not relied on the argument that the robbery was not committed *invito domino*, but on the want of the *animus furandi*; the reward being the object. [Lord *Ellenborough*. Was it not *animus furandi* to assist in the commission of the theft; to aid and comfort the thief, though the immediate benefit did not result to him? The definition is "*lucri causa*," not "*lucri sui causa*." Lord C. J. *Gibbs*. The intention was, to assist in the commission of the theft, and then to get the reward: Suppose *A.*, *B.*, & *C.*, go to rob together, and it is agreed between them that *B.* & *C.* shall take all the plunder: would not *A.* go *cum animo furandi*?] He must contend that he would not. The law had given the reward as an incitement. The bank of *England*, were constantly in the habit of sending their officers, to incite parties to the commission of offences, which afterwards proved the means of conviction: The only difference was, that the character of that company stood so high that no sinister motives could be imputed to them. As to the *second* point, he did not contend that *Vaughan*, might not have been convicted as accessory on the facts proved; but that he was not properly charged. To be sure, a principal might be convicted of part of the crime charged, and the accessory also; but, this was a crime of a totally different species. [Lord C. J. *Gibbs*. Does not your argument go to prove that the principal ought not to have been convicted? Has it ever been decided that a principal may be convicted of a lower offence, and that the accessory cannot?] He admitted the force of what his Lordship said; and concluded by urging the tenderness of the law in criminal cases, when the least doubt appeared in favor of the offender.

No judgment had been pronounced in this case, when the present number was ready for the press; but as the editor will have no future opportunity of presenting it to the profession, he trusts he shall be excused for inserting it as an undecided case.

TRINITY TERM, 56 GEO. III. 1816.

*330] *DWOSE, Demandant; LLOYD, Tenant, REEVE, Vouchee.

Recovery of 'the manor of A. and eight messuages in A.' amended, by adding the names of parishes in which the premises are partly situated; those parishes being comprised in the manor of A.

END OF 2 MARSHALL.



REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
EXCHEQUER CHAMBER.

WITH
TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL
MATTERS.

BY JOHN BAYLY MOORE,
OF THE INNER TEMPLE, ESQUIRE.

VOLUME I.

CONTAINING THE CASES FROM HILARY TERM 57 GEO. III. TO MICHAELMAS TERM
58 GEO. III. 1817, BOTH INCLUSIVE.

(503)

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
HILARY TERM,
IN THE
FIFTY-SEVENTH YEAR OF THE REIGN OF GEORGE III., 1817.

MEMORANDA.

Lord Chief Justice GIBBS was prevented from attendance during the whole of this term, on account of indisposition.

*2]

*DUNN v. SLEE.

A surety in an idemnity bond, may bring an action for contribution against his co-surety, although he had given a subsequent security to the obligees, under which he paid the sum conditioned in the bond, without the knowledge or consent of such co-surety.

THIS was an action of assumpsit on the common money counts, tried before Mr. Justice *Park*, at the sittings at *Guildhall*, after last *Michaelmas* term. The plaintiff sought to recover a proportionable part of 3000*l.*, on an idemnity-bond, which he had entered into with the defendant and two others, under the following circumstances. The defendant's brother, *John Slee*, for the purpose of carrying on his business, as a wine-merchant, had applied to Messrs. *Brown, Hall & Co.*, bankers, at *Brighton*, to open an account with them, and they agreed to accommodate him to the extent of 3000*l.*, provided he gave them pro-

per security to indemnify them against any losses which he might sustain in the course of his business.—In consequence of this, on the 31st of *May*, 1819, *John Slee* prevailed on the plaintiff, and two other sureties, to execute with him a joint and several bond, in the penal sum of 6000*l.*, conditioned to indemnify *Brown & Co.* for any sum of money they might advance to him, not exceeding 3000*l.*, with a proviso, that three calendar months' notice, in writing, should be given by them to the obligors, before any action should be brought on the bond.—In *July* 1814, *Brown & Co.*, doubting *Slee's* solvency, gave notice to the obligors, severally, that there was then due to them, from *Slee*, the sum of 3000*l.*; and acquired payment in three months from the date thereof.—Previous to this notice, one of the co-sureties had become bankrupt, and obtained his certificate. In *December* 1814, the plaintiff, at the urgent request of Messrs. *Brown & Co.*, gave them a warrant of attorney to confess judgment, with a defeazance for payment of 3000*l.* on the first of *June*, 1816:—In *May* 1816, *John Slee* became bankrupt, and Messrs. *Brown & Co.* proved under his commission; and on the 1st of *June* the plaintiff paid them 3000*l.* pursuant to his warrant of attorney, and the bond was thereupon delivered up to him. There was no communication between the plaintiff and his co-sureties when the former gave his warrant of attorney; and *Brown & Co.* refused to give up the bond, or release any of the parties, until the money was actually paid. The defendant resisted payment on two grounds; *first*, that an action by one co-surety against another was not maintainable; and, *secondly*, that the warrant of attorney given by the plaintiff was given in satisfaction and not in aid of the bond, and that consequently the defendant was discharged. The jury gave a verdict for the plaintiff for 891*l.* 10*s.* 2*d.*

Mr. Serjt. *Lens* now moved for a rule to show cause why the verdict should not be set aside, a non-suit entered, or a new trial granted. He said that this was an equitable action, and that the plaintiff therefore could not recover in point of law, as he had individually given a warrant of attorney to confess a judgment as a new security, in which *Brown & Co.* had consented to give him eighteen months further time for payment, and as this was done without the knowledge of his co-sureties, he insisted that the defendant was discharged, the security having been changed; at all events the plaintiff had not paid in aid of the original bond but under the judgment, and therefore he could not call on his co-sureties for contribution.

But *per curiam*, The notice was given by *Brown & Co.* on the 23d of *July*, 1814, to all the co-sureties, who were each jointly and severally liable under this bond.—The plaintiff was called on for payment of the whole amount, when his co-sureties had failed. He has therefore his action against the defendant for contribution, although *Brown & Co.* had given him further time for payment.

Rule refused.

*GILL, et al, v. HINCKLEY.

[*79

The defendant having entered into a consolidation rule, and the plaintiff obtained a verdict on the cause tried, which was afterwards turned into a special verdict, to enable the defendant to remove it by a writ of error to the *King's Bench*, which was done, and bail put in accordingly.—This court will stay execution in the action against the defendant, till the determination of the writ of error be known, on his giving security to be bound by the judgment of the *King's Bench*.

THE defendant, in this action, (being one of several brought by the plaintiff against him, and many other underwriters, upon a policy of insurance,) had

consented to an order to be bound and concluded oy such verdict as should be given in the cause of *Gill* and another v. *Dunlop*, to the satisfaction of the judge before whom the same should be tried.

Upon the trial of that cause, before Lord Chief Justice *Gibbs*, at *Guildhall*, the plaintiffs obtained a verdict, subject to a case ;—and this court, after argument of that case in the last term, 2 Marsh. 440, confirmed the verdict. The facts of the case were afterwards turned into a special verdict, in order that the defendant might remove the cause upon a writ of error, to the court of *King's Bench* ; and a writ of error being consequently brought, and bail in error put in ;

Mr. Serjt. *Best*, in the early part of this term, obtained a rule, calling upon the defendant in this action, to show cause why the plaintiffs should not be at liberty to sign final judgment, as if a verdict had been given for them for the sum of 100*l.*, and to issue execution for that sum, being the amount of the defendant's subscription to the policy, together with the costs of the action, and of this application to the court.

Mr. Serjt. *Lens*, was, on this day, about to show cause,

But, the court, on the defendant's entering into a rule, that the plaintiffs should be at liberty to enter up judgment in this cause, as if a verdict had been given for them for 100*l.* (being the amount of the defendant's subscription to the policy) with a stay of execution till the determination of the writ of error in the cause of *Gill* and another v. *Dunlop*, were known ; he, the defendant, giving such security within fourteen days from the date thereof, to be bound and concluded by the judgment of the court of *King's Bench*, as one of the prothonotaries of this court should approve of, made the

Rule absolute.†

† See *Aylwin v. Favine*. 2 N. R. 430.

*92]

*SILVERSIDES v. BOWLEY.

The plaintiff had holden the defendant to bail, and a verdict was taken for him at the trial, subject to an order of reference for ascertaining the amount of the damages, and the arbitrator awarded a sum less than 15*l.* Upon an application to the court to allow the defendant his costs pursuant to 43 *G. 3. c. 46*.—Held, that in order to entitle the defendant to such costs, he must show that the arrest was vexatious and malicious.

Mr. Serjt. *Pell*, on a former day in this term, had obtained a rule *nisi*, that the defendant should have his costs taxed by the prothonotary, and set against the damages recovered by the plaintiff according to stat. 43 *G. 3. c. 46. s. 3*.† The rule was granted on an affidavit of the defendant, which stated that the plaintiff was employed by him to furnish marble chimney-pieces, and perform certain masonry, according to the terms of an agreement entered into between them, and which he refused to complete. That the materials the plaintiff had furnished, and the labor he had performed, were estimated by a surveyor at 40*l.*, and that the plaintiff had received from the defendant the sum of 33*l. 8s.*, previous to the commencement of this action, and that according to the terms of his agreement, he had been fully compensated. That, notwithstanding this, the defendant was held to bail for 20*l.*, and upwards, and that on the trial of the

† This section authorises costs to be awarded to a defendant, if the plaintiff do not recover the sum for which he held the defendant to bail, and had no reasonable or probable cause for holding him to bail to that amount : and, that in case the sum recovered should be less than the amount of the defendant's costs, the defendant shall be entitled, after deducting the sum recovered by the plaintiff from the amount of his costs, to take out execution for such costs, in like manner as defendants may now by law have execution for costs in other cases.

cause in this term, the agreement, on being produced in evidence by the defendant, was rejected, in consequence of its not being stamped, when the plaintiff being entitled to a verdict, the amount of the damages were left to the award of an arbitrator, who found that 11*l.* 4*s.* 6½*d.*, only were due to the plaintiff. The affidavit concluded by averring that the plaintiff was actuated by malice, and had no probable cause for arresting the defendant.

Mr. Serjt. *Copley*, now showed cause against the rule, on affidavits of the plaintiff, his attorney, and a surveyor, which stated, that the plaintiff had engaged with the defendant to do the masonry at certain prices, and that the defendant should advance money to the plaintiff to purchase marble, and pay him for the masonry as the work proceeded; and that in consequence of such advances not being made, he was unable to proceed, when the defendant would not allow him to complete his work, but employed another person. 'The plaintiff, therefore, applied to a surveyor, who valued the work done by him at 57*l.* 8*s.* 9½*d.* 'That the plaintiff had received 33*l.* 8*s.* from the defendant, leaving a balance of 24*l.* 0*s.* 9½*d.*, for which he arrested the defendant. 'That a copy of the account was sent to the defendant, by the plaintiff's attorney, but payment was refused; he then denied that he was actuated by malice, conceiving the latter sum to be due to him from the defendant. 'The surveyor deposed that the plaintiff was entitled to recover 57*l.* 8*s.* 9½*d.*, and that the prices of the marble furnished were far below the trade prices. 'The plaintiff's attorney stated that the plaintiff had offered to leave the sum due to him from the defendant to arbitration, previous to the commencement of the action, which the defendant had refused, and that the arbitrator in the present instance had received the agreement in evidence, although rejected at the trial, and directed a verdict for 11*l.* 4*s.* 6½*d.* to be entered accordingly.

Mr. Justice DALLAS.—The only question is, whether the plaintiff, by swearing to a greater sum than has been awarded to him by the arbitrator, can be considered as having holden the defendant to bail without any reasonable or probable cause. Nothing, in this instance, can warrant such a supposition. 'This application must be considered as analogous to an action on the case for a malicious arrest, which cannot be supported, unless malice be averred and proved. See *Scheibel v. Fairbairn*, 1 B. & P. 338.—*Gibson v. Chaters*, 2 B. & P. 129. It was improper for the defendant to call in a surveyor, on his part, to estimate the value of the work done, without giving notice of the valuation to the plaintiff, particularly as there was an agreement existing between the parties. 'The consent of the plaintiff to leave the amount of the damages to an arbitrator, excludes all presumption of malice on his part, who has, on the contrary, treated the defendant not only with lenity, but indulgence.

Mr. Justice PARK.—The affidavits adduced on the behalf of the plaintiff are sufficient to show that he had probable cause to arrest the defendant. 'The plaintiff's surveyor had estimated the labor and materials at 57*l.*, from which sum he had received 33*l.* only. He was therefore warranted in holding the defendant to bail for the remainder. 'This application is against good faith, and an unjust proceeding on the part of the defendant.

Mr. Justice BURROUGH, concurred.

Rule discharged.†

† See *Neale v. Porter*, *Burns v. Palmer*, cited in 2 Tidd. 1018, 6th edition.

EASTER TERM, 57 GEO. III. 1817.

*PROSSER, et al., v. HOOPER.

The plaintiff bought saffron of an inferior quality, which, having kept six months, and sold part, he then objected that the article was not saffron.—Held, in an action for a breach of warranty, that from the length of time and inferior price given, it was such an article as the plaintiff intended to purchase.

THIS was an action brought against the defendant for a breach of the warranty contained in the following contract for sale.

London,
November, 28, 1815.

Messrs. Prosser & Mason,

We have this day bought, by your order, and for account of Hooper, Ward, & Payne, about 100lbs. of saffron, 48s. per lb., customary allowances.

Prompt,
fourteen days.

Discount at $2\frac{1}{2}$ per cent on four months.

Ward & Payne.

The declaration contained a warranty that it was merchantable saffron.

The cause was tried before Mr. Justice Dallas at Guildhall, at the sittings after the last term, when it was proved by two witnesses, on behalf of the plaintiffs, that the article sold was not saffron, but that a fourth part consisted of a vegetable resembling it, which it was impossible to detect at the time of the sale. The broker, who made the contract, was called for the defendant, who stated that the plaintiffs knew that the saffron was of an inferior quality, and that they paid for it accordingly, at the rate of forty-eight shillings per lb., when the best was worth seventy-three shillings. It was further proved that the plaintiffs examined the bulk; refused to buy by sample; that they kept it six months without objecting to the article, and that they had sold part of it, when they insisted that it was not saffron, and brought their action accordingly. It was urged by the plaintiff's counsel that the keeping of the article for six months could not do away the contract, which was for the purchase of saffron, and that the maxim of *caveat emptor* could not be set up as a defence for the non-performance of a written contract. The jury, however, found a verdict for the defendant.

Mr. Serjt. Best, now moved that this verdict should be set aside and a new trial granted. He contended, that it was necessary for the plaintiffs to have the whole of the commodity, saffron; that as it was not so, the warranty was broken, and they were therefore entitled to a verdict. If it had been saffron of different qualities, however inferior, the contract would have been satisfied, but as it had been sold by the name of saffron, it was necessary that the whole of it should consist of that article. He referred to the case of *Yeats v. Pim*, 2 Marsh, 141, as somewhat resembling the present, and Lord Chief Justice Gibbs, had there held, that where a party undertakes to supply goods of a certain description, he must execute his agreement accordingly. That principle is particularly applicable to this case, which is stronger than that of *Yeats v. Pim*, as there, the article sold was not prime bacon, but tainted; here the article sold was of a different description to that specified in the contract. The earlier cases establish this principle. Mr. Justice Doderidge, in the case of *Southern v. How*, Cro. Jac. 471, has held, that if a goldsmith make plate in which he mixes dross, so that

it is inferior to the standard, and send his servant to sell it, who sells it for good plate, an action lies against the master, to which decision Chief Justice *Montague*, assented, because it failed in price. The distinction is this, if an article be of the same sort, though inferior in value, an action would not be maintainable, but if it be of another description, then an action lies. In *Hearn v. Nichols*, 1 Salk. 289., which was an action on the case for deceit, by a factor, in the sale of silk, the plaintiff declared that he bought several parcels of silk for —silk, whereas it was another kind of silk, and that the defendant, knowing this deceit, sold it for —silk. Lord Chief Justice *Holt*, was of opinion, that the defendant was answerable for the deceit of the factor. If the plaintiff had declared in tort for a breach of the warranty, declaration would be similar to that in *Hearn v. Nichols*. [Lord Chief Justice *Gibbs*.—If you had declared in tort, the *scienter* need not have been proved, see *Williamson v. Allison*, 2 E. R. 446.] Nor is it necessary here to state that the article was sold as saffron, or that the seller undertook that it was so. He, therefore, relied on the authority of the cases cited, and insisted that the plaintiffs were entitled to a verdict.

Lord Chief Justice *Gibbs*.—I do not dispute the authority of any of those cases which have been cited, but they are inapplicable to the present. This article was sold to the plaintiffs by the name of saffron; they examined it with great minuteness, received it into their custody, kept it six months, and then sold a part of it. Although only three-fourths of it were saffron, still it was fair for the jury to infer, from the inferior price which was given for it, that it was such an article as the plaintiffs intended to purchase; and, under all the circumstances, they were justified in giving their verdict for the defendant.

The rest of the court concurred.

Rule refused.†

† See *Gardiner v. Gray*, 4 Camp. 144.

*DOE, on the demise of the GOVERNORS of the HOSPITAL of St. MARGARET, WESTMINSTER, v. ROE. [*113]

A notice at the bottom of a declaration in ejectment affixed to the door of an empty house, addressed to the personal representatives of the deceased tenant generally, was held insufficient; as if there had been representatives who had taken possession, they should have been addressed by name; if not, the lessor of the plaintiffs should have proceeded as in the case of a vacant possession.

Mr. Serjt. *Onslow*, moved for judgment against the casual ejector:—By the several affidavits of the clerk of the attorneys and receivers of the rents for the lessors of the plaintiff, it appeared that on the day preceding the essoign day, which was the 19th of *April*, and before the messuage for which this action of ejectment was brought, late in the occupation of *George Goldwire*, deceased, was shut up and unoccupied; that a copy of a declaration in ejectment was affixed on that day to the street-door, and that there was due from the representatives of *Goldwire* the sum of 81*l.*, for two years and a quarter's rent, reserved by an indenture lease, made between the lessors of the plaintiff and *Goldwire*; that no distress was on the premises on the 18th of *April*, and that the lessors of the plaintiff had power to enter for non-payment of rent. The notice at the bottom of the declaration was addressed to the personal representative or representatives of *George Goldwire*, deceased, and to all and every other person

or persons claiming any right or title to the possession of the premises, and required them to appear accordingly.

Per curiam.—This is a proceeding under the statute, 4 Geo. 2. c. 28., although in the nature of a vacant possession. There is no doubt but that the affixing a copy of the declaration on the door of the premises was sufficient; but the difficulty arises on the fact, whether the notice was properly addressed. It is directed to the personal representative or representatives of the deceased, generally. If he had a representative, who had taken possession, such representative, should have been addressed by name; if there were no personal representative, the lessors of the plaintiff should have proceeded as in the case of a vacant possession.

The learned serjeant therefore took nothing by his motion.

*125] *BYE, Plaintiff; HAYWOOD et al., Deforciant.

Fine amended by altering the surname of one of the deforciant in the præcipe and concord, conformably to his signature in the covenant and *dedimus*.

*125] *MOULE, Plaintiff, EYLES et ux., Deforciant.

If the clerk of an attorney, employed to levy a fine, absconded, whereby the papers are mislaid, the court will permit such fine to be afterwards perfected, although the time allowed by rule of court of *T. T. 52 G. 3.* be exceeded.

*126] *ANONYMOUS.

The misnomer of a Christian name of one of the bail in a cognizance and notice, is fatal.

*131] *WILLIS, Demandant; CALVERT, Tenant; BARTHÓLOMEW et ux., Vouchees.

The court permitted a recovery to be amended by substituting the hamlet of *F.* in the parish of *A.* for the parish of *F.*

*BELL, et al., v. JUTTING et al.

If a person employed by ship-owners, as their agent, effect a policy of insurance, and represent himself as the principal to the brokers, who cause such insurance to be effected.—*Held*, that if the brokers receive the amount of the loss from the underwriters and pay it over to the agent, they are liable to the owners; in an action for money had and received, although part of the money was paid to the agent after they were informed of his having acted in that capacity.

THIS was an action for money had and received; and tried before Mr. Justice Park, at the sittings at *Guildhall*, after the last term; when it appeared that the plaintiffs, being the owners of a ship, called "*The Lady Hood*," had ordered a person by the name of *Brown*, to effect an insurance of 2000*l.* for them, on freight, from the river *Plate* to *Lisbon*, and that *Brown* directed the defendants, who were brokers, to effect such insurance for himself, as the principal, without disclosing the names of the plaintiffs. A loss afterwards happened, and the defendants collected 2000*l.* from the underwriters, and paid over 800*l.*, in part of such loss, to *Brown*, without receiving any notice, as to the plaintiff's claim. In that stage of the proceedings, one of the plaintiffs desired the defendants not to pay the remainder to *Brown*, to which they assented; but afterwards paid the residue to him, and resisted the plaintiff's demand, on the ground of such payment.—It was proved, at the trial, that the plaintiff's were the owners of the ship, and that *Brown* had chartered her for the voyage from the river *Plate* to *Lisbon*; and it was shown, that *McDonnall*, one of the defendants, had admitted to one of the plaintiffs that he had collected the 2000*l.*, and at that time had only paid 800*l.* over to *Brown*, and that he had promised not to pay him the remainder. On these facts, the learned judge was of opinion, that the defendants were liable for the money, which had not been paid over to *Brown*, after they received the notice; and the jury gave a verdict for the plaintiffs accordingly, for 1126*l.*, being the balance of the insurance, after deducting the 800*l.* paid to *Brown* prior to the notice, together with the premiums, brokerage, &c.

Mr. Serjt. *Best*, on a former day in this term, obtained a rule *nisi* that this verdict should be set aside, and a new trial granted; on the ground, that no privity was proved to have existed between the plaintiffs, as owners of the ship, and *Brown*, who caused the policy to be effected.

Mr. Serjt. *Copley*, now showed cause, and submitted, that there was no pretence to impeach the verdict which the jury had found for the plaintiffs.—He contended that *Brown* had no interest in the ship, but had merely been employed by the plaintiffs as their agent:—Unless *Brown's* interest could be shown, the transaction, as to the policy, was fraudulent.—The defendants were apprised of the relative situations of the parties, and should, therefore, after the notice given to them, have paid the remainder of the loss to the plaintiffs.—He relied on the case of *Lucena v. Crawford*, 3 B. & P. 265, S. C. 2 N. R. 269, where it was held, that commissioners, appointed by the crown, were held to have an insurable interest, although the crown might intervene. The same principle was adopted in the case of *Routh v. Thompson*, 13 E. 274. He cited these cases to establish the general principle, that if an insurance be effected by a person supposing himself to be interested, but such insurance was effected on the part of other persons having an interest therein, those persons had a right to claim. There was sufficient evidence in this case, to show that *Brown* effected the policy, as agent for the plaintiffs. *Brown*, therefore, had no right to claim the amount of the loss from the defendants; and their paying over the money to him, after the notice given by the plaintiffs, was fraudulent; for by such payment they recognized that *Brown* acted in the capacity of an agent.—All the facts were considered by the jury; and, as they conceived

Brown to be merely an agent, they accordingly gave their verdict for the plaintiffs.

Mr. Serjt. *Best*, in support of the rule, was stopped by the court.

Lord Chief Justice *Gibbs*.—It makes no difference, whether *Brown* had a real or pretended interest in the policy. No evidence has been adduced to prove that *Brown* acted as the agent for the plaintiffs.—No case has been cited to authorize the plaintiffs to enforce the performance of the terms of the policy. The policy was effected by the defendants, who considered *Brown* to be the principal. Whether *Brown* acted from ignorance, or fraud, it still appears that he effected the policy on his own account. The defendants paid the amount of the loss to him, being ignorant that he acted in the capacity of a broker. There is no doubt but that *Brown* was once interested, as the charterer; and it is impossible to say what object he had in view when he effected the policy. If the underwriters had a previous knowledge of the facts, they might have resisted the payment. If not, and after having made such payment, they might recover it back. *Brown*, placed himself in the situation of a principal, and considered the plaintiffs as his agents.—He has never agreed that the plaintiffs should be entitled to the benefit of the policy; and, therefore, they have no right to recover. This case resembles that of *Godin v. The London Assurance Company*, 1 Burr. 489. I therefore think that the plaintiffs cannot enforce payment from the defendants against the will of *Brown*, as there is no evidence to show that he had acted as their agent.

Mr. Justice *PARK*.—At the trial, I thought that the plaintiffs had a right to recover; but, on a more deliberate consideration of the case, I am of opinion, that the evidence adduced was not sufficient to entitle them so to do. I considered *Brown* in the light of an agent for the plaintiffs; but I now perceive that he was not so, since the policy was effected on his own account, and not for the plaintiffs. I carried the doctrine of *ratihabitio* further. In the cases of *Lucena v. Crawford*, and *Routh v. Thompson*, the persons effected the insurance for the benefit of the crown, who were entitled to recover.

Mr. Justice *DALLAS* and Mr. Justice *BURROUGH* assenting.

Rule absolute.†

† See *Routh v. Thompson*, 11 E. 428, *Mann v. Forrester*, 4 Camp. 60, *Westward v. Bell*, 4 Camp. 349.

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*TAYLOR v. HOOMAN.

In a declaration of trespass for breaking and entering a house, the premises were laid in the parish of *Clerkenwell*. It was proved that *Clerkenwell* consisted of two parishes or districts, though it was generally known by the name of *Saint James, Clerkenwell*.—*Held*, an insufficient description.

THIS was an action of trespass for breaking and entering the plaintiff's house, and demolishing his furniture, tried before Lord Chief Justice *Gibbs*, at *Westminster*, at the sittings in this term.—The declaration contained several counts, all of which stated the trespasses to have been committed in the parish of *Clerkenwell*, in the county of *Middlesex*. It was proved on behalf of the defendant, that *Clerkenwell* consisted of two parishes, the one called *Saint John*, the other *Saint James*; that a rector officiated at the former, and that a curate was appointed by the parishioners to serve the latter, although both parishes were generally known by the name of *Clerkenwell*.—His lordship

held that *Clerkenwell* was an improper description in the declaration, and directed a nonsuit.

Mr. Serjt. *Best*, now moved for a rule *nisi*, that the nonsuit might be set aside, and a new trial granted; observing, that there was, in fact, only one parish, known by the name of *Saint James Clerkenwell*, and he referred to the statutes 15 G. 3. c. 23,† and 17 G. 3. c. 63,‡ in which it was so described. He produced affidavits of one of the parishioners, the superintendant of the parochial department, and the vestry clerk, who deposed that they had known the parish and its boundaries several years, and that there was only one general and distinct parish, commonly called *Clerkenwell*, which was particularly distinguished by the name of *Saint James Clerkenwell*. That *Saint John's* was merely a district, which, although it had a chapel, dedicated to that saint, was altogether under the control of *Saint James's*, except as to the paving and lighting acts.

Lord Chief Justice GIBBS.—It was proved at the trial, that there were two parishes in *Clerkenwell*, the one known by the name of *Saint John*, the other by that of *Saint James*. *Clerkenwell*, therefore, is not a sufficient description. The acts of 15 G. 3. c. 23, and 17 G. 3. c. 63, do not form a part of the public statutes.

The court, however, granted the rule, and permitted the plaintiff to amend his declaration, by adding a count on payment of costs.

† Entitled "An act for building a workhouse, and for the better relief and employment of the poor within the parish of *Saint James Clerkenwell*, in the county of *Middlesex*."

‡ Which was an act to explain and amend an act, made in the 14th year of the reign of his present majesty, entitled "An act for paving, repairing, lighting, and watching, the streets and other public passages and places within that part of the parish of *Clerkenwell* called *Saint James's*, and removing obstructions and annoyances therein, &c."

*GARLAND et al., (surviving partners of BAKER, deceased,) v. NOBLE et al. [*187

An action was commenced against two defendants, as partners, resident abroad.—The plaintiff proceeded to and obtained outlawry; the partnership being dissolved, one of the defendants arrived in *England*, and was arrested on a *capias utlagatum*.—A rule was obtained for reversing the outlawry.—By an order of reference all matters in difference between the parties were submitted to an arbitrator, who refused to consider the claims of the defendants, respecting the outlawry, but confined himself to the action commenced against them.—*Held*, that he was not bound to take the outlawry into consideration, as no joint specific injury was stated to have been sustained by both the defendants, and the court refused to set aside the award.

*INGLIS v. MACDOUGAL.

[*196

If a surety enter into a bond with a principal, conditioned for the performance of covenants contained in an agreement for a lease, such surety is still liable, although the principal become bankrupt and be discharged under the 49 G. 3. c. 121. s. 19.

TRINITY TERM, 57 GEO. III. 1817.

*LEDWICH, gent. one, &c. v. PRANGNELL.

If a defendant be irregularly served with process, he may apply to set aside the proceedings, although the plaintiff may have entered an appearance for him, and served him with a notice of declaration and given him a rule to plead.

MR. Serjt. *Pell*, on a former day in this term, had obtained a rule *nisi*, that the service of the writ of attachment of privilege issued in this cause, and the subsequent proceedings thereon, should be set aside for irregularity, with costs. It appeared by affidavits, in support of his motion, that the defendant was, on the 25th of *January* last, served with an attachment of privilege, in the county of *Middlesex*, which was directed to the sheriff of *London*; and that on the 20th of *May* following, he was served with a notice of declaration.

MR. Serjt. *Vaughan*, now showed cause on an affidavit of the plaintiff's which stated that the defendant was indebted to him for business, as an attorney, and that he issued an attachment of privilege, directed to the sheriff of *London*, on the 24th of *January*, which was served on the defendant the following day. That on the 11th of *February*, the defendant applied to him, to ascertain the amount of the debt and costs, but did not complain of any irregularity in service of the process.—The plaintiff took no further proceedings, until the 19th of *April*, when he caused an appearance to be entered for the defendant according to the statute, and filed his declaration, and on the 20th of *May*, served the defendant with a notice thereof, and on the first day of this term gave a rule to plead. He submitted, that the defendant was bound to object to the irregularity in the service of the process, in the first instance; and relied on the cases of *Fox v. Money*, 1 B. & P. 250, and *Downes v. Witherington*, 2 Taunt. 243; or that, at all events, the defendant should have applied to set aside the proceedings, prior to this term.

LORD CHIEF JUSTICE GIBBS.—The practice of the *King's Bench* differs from this court; as there, a party must apply in cases of irregularity, within a reasonable time. In this court, after an irregular step is taken by one party, the other is not bound to apply to set it aside until further proceedings be had. In this case, no further step was taken by the plaintiff, until the first day of this term, which was no waiver of the irregularity.

Rule absolute.

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*EMMETT et al. v. BRADLY et al.

In an action against several defendants, as partners, for goods sold; some of whom pleaded bankruptcy, and others the general issue:—*Held*, that after the plaintiff had closed his case, and the bankrupt defendants had proved the bankruptcy, one of the bankrupts could not be admitted as a witness, to show a dissolution of the partnership, prior to the delivery of the goods.

THIS was an action of *indebitatus assumpsit* for goods sold and delivered, and for work and labor.—The declaration contained the usual counts. There were five defendants, three of whom pleaded that they had become bankrupts

before the cause of action accrued, and that the plaintiffs had proved their debt under the commission. The replication traversed the proof of the debt under the commission, but admitted such commission and the identity of the debt, and upon that traverse issue was joined. The other two defendants pleaded the general issue.

This cause was tried before Mr. Baron *Wood* at the last assizes for *York*, when, on the part of the plaintiffs, a deed, bearing date the 11th of *August*, 1810, was produced, for the purpose of showing that a partnership had existed between all the defendants up to that day, and that the goods, for the amount of which this action was brought, had been delivered to them by the plaintiffs, about the end of the year 1809. It was also proved, by several witnesses, that the goods were furnished to all the defendants.—On behalf of the defendants, the proceedings under the commission were given in evidence, when it was submitted, by their counsel, that a verdict should be entered on that part of the record for the bankrupt defendants, with an intention of calling one of them as a witness, to prove that an instrument, dated in 1800, operated as a dissolution of partnership *quoad* those two defendants, who had pleaded the general issue, and that the deed of *August*, 1810, was only a disposition of the remaining property of the partnership.—The learned judge considered that the deed of *August*, 1810, was conclusive to show that the partnership existed between all the defendants until that period, and refused to admit the evidence of one of the bankrupt defendants, who was called to deny the existence of the partnership in 1810. The jury found a verdict for the plaintiffs against the two defendants, who had pleaded the general issue, and a verdict for the other three on their plea of bankruptcy.

Mr. Serjt. *Hullock*, in the course of the last term, obtained a rule *nisi*, that this verdict should be set aside, and a new trial granted. He founded his motion on two grounds; *first*, as to the misdirection of the learned judge, relative to the effect of the deed of *August*, 1810; and, *secondly*, the rejection of one of the bankrupt defendants as a witness. To show the defendant's admissibility as a witness, he cited the cases of *Moravia v. Hunter*, 2 M. & S. 444.—*Noke v. Ingham*, 1 Wils. 89, and *Raven v. Dunning*, 3 Esp. 25. S. C. Append. Peake Evid. 4th edit. 87.

Mr. Serjt. *Best*, (and Mr. Serjt. *Vaughan* was with him,) now showed cause.

[It appearing that the learned judge left it to the jury to determine whether the deed of the 11th of *August*, 1810, was insufficient to show that the partnership between all the defendants continued to that day; the court held that there was not ground for setting aside the verdict as to the misdirection of the learned judge; and it is, therefore, unnecessary to state either the arguments or judgment of the court on that point.]

They then submitted, that the learned judge, under the circumstances of this case, was perfectly correct, in not allowing one of the defendants to be called as a witness; as the case on the part of the plaintiffs had closed, and the defendant's counsel had offered evidence to the court and jury in defence of that particular defendant, whom it was proposed to call as a witness. If the plaintiffs had made out no case, and no evidence had been offered against one of several defendants, a distinction might be drawn, but this rule cannot be carried further. They cited *Buller*, N. P. 285.—*Raven v. Dunning*, 3 Esp. 25.

Mr. Serjt. *Hullock*, in support of the rule, submitted that one of the defendants, who had pleaded his bankruptcy, was an admissible witness in that period of the case in which he was offered to give his testimony on behalf of his co-defendants, and that a verdict should then have been taken for him. He cited *Ward v. Haydon*, 2 Esp. 553. S. P. 2 Camp. 334, n.—*Brown v. Fox*, MS. Exeter Sum. Ass. 1789. Phil. Evi. 3d edit. 63.—*Brown v. Brown*, 4 Taunt. 752, and *Chapman v. Graves*, 2 Camp. 333, note.

Lord Chief Justice *Gibbs*.—This case was moved by my brother *Hullock*,

on two grounds: the one, that the learned judge had rejected evidence which was offered, and which ought to have been received; the other that he had misdirected the jury, in stating the effect of the deed, dated in *August*, 1810, differently from what it really was. *First*, the witness offered by the defendants, in order to prove that all of them had never entered into a joint contract with the plaintiffs, admitted such contract by his plea, and merely relied on his bankruptcy. The bankrupts stood as defendants on the record, and contended that they had a legal defence;—the plaintiffs went through their proof, and, I am not aware of any case, in which it has been laid down to be the duty of a judge, to give his opinion of the legal effect of particular evidence in the middle of a cause, in order to have an opportunity of introducing other witnesses to be examined for the defendants, and still less so, to admit witnesses to disprove that which they had before admitted to be true. Upon these grounds, therefore, I am of opinion, that such evidence was very properly rejected:—*Secondly*, with respect to the deed, the learned judge left it to the jury to determine, whether there were a dissolution of the partnership before its execution, intimating it at the same time to be his opinion, that such was not the case; I, therefore, think there is no ground to disturb the direction of the learned judge, with respect to the law, nor the verdict found by the jury, with regard to the facts.

Mr. Justice DALLAS.—It is evident that a partnership once subsisted between all the defendants. It was left as a question for the jury to decide, whether this partnership had been dissolved before the deed of *August*, 1810; and as no evidence was adduced to prove such dissolution before that time, I consider they have rightly determined. With respect to the objection, whether the evidence of the bankrupt defendants was properly rejected or not, I have listened very attentively to the whole of my brother *Hullock's* argument, and have heard no case cited by him which appears to bear upon this point. It is an application of a novel nature, but on the first view of the case, I did not see how it could be supported in principle, for the following reasons:—The general rule is clear, that no person appearing as a party on the record, can be admitted as a witness in the action; unless it seem that such person is acquitted of his liability to the action, and then he may be admitted as a witness for the other defendants. That rule, however, is subject to this qualification: that if there be any evidence given against a defendant, he cannot be admitted as a witness, for the jury are entitled to exercise a discretionary judgment on such evidence; and though the judge may give an opinion before it goes to the jury, still it rests with the latter, and in this case it appears that there was evidence adduced on the part of the defendants, and it was not until after the conclusion of the plaintiff's evidence, that the defendants applied to support their case by the admissibility of one of the bankrupts as a witness. I have never known this to be allowed, and think the learned judge was perfectly correct in his decision.

Mr. Justice PARK.—I think the principle to be clear, that a plaintiff, or defendant, or any party upon the record, cannot be admitted as a witness in such a case. It was, therefore, incumbent on my brother *Hullock*, to have shown a case where, on a question of contract, there are two or more parties entered on the record, and where there is an issue joined, that the defendants may call on the judge to admit one of them to be examined as a witness. In the case of *Chapman v. Graves*, Mr. Justice *Le Blanc* admitted, that a co-trespasser, not sued; was a competent witness for the plaintiff; and, in another case also, tried before Mr. Justice *Le Blanc*, on a joint contract, at *Lancaster*, one defendant was allowed to be a witness for the other; but in that case the defendant, who was admitted as the witness, had pleaded his bankruptcy, and a *nolle prosequi* had been actually entered. Under all the circumstances, therefore, I do not feel myself warranted to differ in opinion from the Lord Chief Justice, and my brother *Dallas*.

Mr. Justice BURROUGH.—I have never heard of an instance, where a defendant on a record in a cause has been permitted to appear as a witness, unless on

the conclusion of the plaintiff's case, except where one of the defendants appeared to be acquitted of his liability, but then he is no longer a party on the record. Such is the constant course in actions of trespass; but in this case the defendants were obliged to go into evidence to prove their case on a plea, which in express terms admits a joint cause of action against them all; yet one of those defendants, it is contended, is to be admitted to prove that no joint cause of action had accrued, but he had with the others, expressly admitted it on the face of the record. I am, therefore, clearly of opinion, that the evidence ought not to have been received. The case is left precisely in the same situation as it stood in before the defendants were under the necessity of going into proof, after the plaintiff's case was closed, and as they were compelled to do so, I think this witness was properly rejected.

Rule discharged.†

† See *Currie v. Child*, 3 Camp. 283. Bul. N. P. 98.

*HARTLEY v. HODSON.

[*410]

If a defendant, in an action on a recognizance of bail, under a Judge's order to plead issuably, plead, *first, nul tiel record*, and *secondly*, that no *ca. sa.* was issued out against the principal.—*Held*, that such pleas might be considered as issuable, and that the plaintiff could not sign judgment as for want of a plea.

THIS was an action on a recognizance of bail. The defendant had obtained an order for time to plead, pleading issuably, rejoining *gratis*, and taking short notice of trial. He afterwards pleaded, *first*, that there was no record of the recognizance, *secondly*, that after the judgment against the principal, the plaintiff sued out a *fi. fa.* directed to the bishop of *Durham*, to levy the damages recovered, whereby the sheriff levied such damages of his goods and chattels; and, *thirdly*, that there was no writ of *ca. sa.* sued out of this court against the principal upon the judgment, and duly returned in the court, as according to law, and the custom of this court, before the commencement of the suit there ought to have been. Upon which pleas the plaintiff signed judgment, as for want of a plea.

Mr. Serjt. *Hullock*, on a former day, in this term, had obtained a rule *nisi*, that this judgment should be set aside for irregularity.

Mr. Serjt. *Blosset*, now showed cause on an affidavit, which stated that all these pleas were in fact false, and that neither of them could, therefore, be considered as issuable pleas. He referred to the cases of *Heron v. Heron*, 1 Sir *W. Black.*, 376.—*Levfield v. Jackson*, 2 Wills. 117.—and *Cave v. Aaron*, 3 Wills. 33. At all events, the first and third are merely sham pleas; and although the second might not, in strictness, be so, still the plaintiff was entitled to sign judgment. *Waterfall v. Glode*, 3 T. R. 305.

Mr. Serjt. *Hullock*, in support of the rule, insisted, that the first and third pleas were issuable, and referred to *Tidd's Practice*, 1 Vol. 6th edit. 271., to show that on bail being perfected in this court, an entry should be made of the recognizance on a roll, which should be docketed and carried into the *Treasury-Chamber*, and that this should regularly be done before any proceedings against the bail, or at least before they were called on to plead, for otherwise they might plead *nul tiel record*, and if the recognizance roll were not carried in till afterwards, it seems that they might withdraw their plea; and the plaintiff must pay the costs of it.

Lord Chief Justice GIBBS.—The question is, whether the first and third of

these pleas were issuable. It is difficult to ascertain what pleas really are issuable.—Although sham pleas, upon the face of them, appear to be issuable, still they cannot be so considered. In a plea of judgment recovered, if there be no foundation for it, it cannot be an issuable plea, and although it might be a true plea, still, as it is so commonly pleaded, the plaintiff might sign judgment. I remember, in the court of *King's Bench*, when a party was bound to plead issuably, and pleaded a false plea, and that the plaintiff had signed judgment, that it was necessary for the defendant to support the truth of his plea by affidavit. Although, in principle, the first and third pleas are false, and I should have been strongly disposed to have treated them so, yet the officer of the court says, that by the practice, they may be considered as issuable pleas, and be admitted as such, under an order similar to the present.

Per curiam.

Rule absolute, without costs

MICHAELMAS TERM, 58. GEO. III. 1817.

*514]

*HARTLEY v. HODGSON.†

A bailable, and not a *testatum capias*, was issued into *Durham*, and signed by the *fi. ex* for that county. The defendant was arrested, and put in bail as upon a *testatum*. A declaration was afterwards delivered, in which the venue was laid in *Lincolnshire*. A recognizance of bail was entered into in *Middlesex*, and a declaration on such recognizance was afterwards delivered, to which the defendant pleaded. On a motion to amend the entry of the recognizance from *London* to *Durham*,—*Held*, that the defendant having submitted to the arrest, and put in and got bail allowed, as upon a *testatum capias*, had waived the irregularity, and the court refused to interfere, but left the party to his ordinary remedy, and expressed their opinion that such writs ought not to issue in future.

† For the previous proceedings in this case, see *ante*, 400.

*520]

*HEMMING v. PLENTY.

The court permitted a person to justify as bail, although he did not reside in the house in which he was described in the notice.

Mr. Serjt. *Best*, opposed the justification of bail, on the ground that one of them did not reside in the house where he was described in the notice.—The bail said that the house was kept jointly, by himself and his partner, who carried on business as soap manufacturers; that the rent and taxes were paid by them jointly, and that his partner resided in the house; but that he himself lodged at the distance of a mile and a half from it.

The court, after some deliberation, permitted the bail to justify, and Mr. Justice *Dallas*, observed, that if a person thus situated was not allowed to do so, it might possibly tend to the rejection of many responsible persons living at a distance from the house in which their business was carried on.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
EXCHEQUER CHAMBER.

WITH
TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL
MATTERS.

BY JOHN BAYLY MOORE,
OF THE INNER TEMPLE, ESQUIRE.

VOLUME I.

CONTAINING THE CASES FROM HILARY TERM 57 GEO. III. TO MICHAELMAS TERM
58 GEO. III. 1817, BOTH INCLUSIVE.

(503)



CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
EXCHEQUER CHAMBER,
IN
HILARY TERM,
IN THE
FIFTY-EIGHTH YEAR OF THE REIGN OF GEORGE III., 1818.

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*WHITE v. REEVES et al.

The plaintiff having an allotment made to him by a commissioner, under an enclosure act, of land, over which the defendants had a private right of way before the passing of the act, but which way was not noticed or described amongst those set out by the commissioner appointed for executing that act, the operation of which, as to the powers of setting out or stopping up roads, was left to the general enclosure act, (41 G. 3. c. 109.) may, under the 11th section of the latter statute, justify the stopping up of such way, without any directions from the commissioner for that purpose in the award, or any other road being set out or appointed in lieu of it.

A rejoinder to a replication in trespass for stopping up a private way under an enclosure act, alleging that the commissioner did not direct the way to be stopped up, or give any orders relating to the same,—or by his award, set out, or appoint any other way in lieu of it, is bad for duplicity.

*CASBURN v. REID, Sheriff of Hertford.

In an action against a sheriff for an escape, the plaintiff averred in his declaration that a writ was indorsed for bail, by virtue of an affidavit of the plaintiff's cause of action before then made and duly filed of record. Held, that the production of an office copy of the affidavit was sufficient to prove such averment.

THIS was an action brought against the defendant, for an escape. The declaration stated that *John Deval*, was indebted to the plaintiff in the sum of 40*l.*, on a cause of action before then accrued, to recover which, the plaintiff sued out a writ of *capias*, directed to the sheriff of *Hertford*, which writ was marked for bail, for 19*l.*, and upwards, by virtue of an affidavit of the cause of action of the plaintiff in that behalf before then made, and duly filed of record in this court, according to the form of the statute, &c.

At the trial of the cause, before Lord Chief Justice *Ellenborough*, at the last assizes for *Hertford*, the affidavit of debt, in the original action, and the writ of *capias* issued thereon, were proved by office copies; when it was contended, for the defendant, that the original affidavit of the plaintiff should have been produced. And the case of *Webb v. Herne*, 1 Bos. & Pul. 281. was relied on, where it was held, that in an action of escape against the sheriff, if the plaintiff aver in his declaration, that *J. S.* was arrested under a writ, indorsed for bail, by virtue of an affidavit now on the record, he must produce the affidavit in evidence, though the latter part of the averment was unnecessary. His Lordship, on the authority of that case, directed a non-suit to be entered.

Mr. Serjt. *Onslow*, in the last term, had obtained a rule *nisi*, that this non-suit might be set aside, and a new trial granted, on the ground that the affidavit having been filed, an office copy was sufficient. And that it did not appear in the case of *Webb v. Herne*, that an affidavit had been filed; and the plaintiff there was unable to produce any affidavit, and the question did not turn on, whether the production of the original, or office copy of the affidavit was necessary to be produced, but as there was a substantive allegation of the existence of an affidavit, it must be proved.

Mr. Serjt. *Copley*, now showed cause, and insisted that the office copy of the affidavit was inadmissible as evidence for the plaintiff; and though the latter part of the averment was unnecessary, still the plaintiff having averred that the writ was indorsed by virtue of an affidavit before then made and duly filed of record, such averment must be duly proved. Whatever is filed of record, may be proved by an examined copy; but it is material to observe, that the declaration stated, that the writ was indorsed by virtue of an affidavit before then made. Lord *Ellenborough* thought, at the trial, that unless the original were produced, and duly signed, it was not sufficient. The case of *Webb v. Herne*, did not support the objection that had been raised for the plaintiff.

Mr. Serjt. *Onslow*, in support of the rule, was stopped by the court.

Mr. Justice DALLAS.—If the original affidavit had been produced, it would have been necessary to prove the hand-writing of the plaintiff, but that need not be done in an office copy. The distinction drawn by my brother *Copley*, that the writ was indorsed by virtue of an affidavit before then made, was not adverted to by Lord *Ellenborough*, on the trial; but it appears that his Lordship's decision was grounded on the authority of the case of *Webb v. Herne*; but that case does not govern the present: it was there held, that though it was unnecessary to state that *J. S.* was arrested by virtue of an affidavit now on record, yet that the affidavit must be produced in evidence; but no inference can be drawn from that case, that if the plaintiff had been furnished with a copy, it would not have been sufficient. If the declaration had stated, that the affidavit had been made by the party himself, it would be necessary to produce and prove the original, in order to comply with such averment; but in this case it is averred, that the affidavit was made generally, without expressing by

whom. The only question then is, whether an examined copy of such affidavit be, or be not sufficient; there can be no doubt but that it must be filed of record, and it appears by the declaration, that it has been duly filed. Without referring to other authorities, the distinction between the production of original or office copies of affidavits is drawn in the case of *Croke v. Dowling*, Bull, Ni. Pri. 14., which was an action for maliciously holding to bail. The court held, that if the declaration had averred that an affidavit to hold to bail had been made, an office copy of it would have been sufficient; but if it were stated to have been made by the defendant, himself, perhaps the original affidavit must be produced and proved.

Mr. Justice PARK.—The case of *Webb v. Herne*, was cited generally at the trial, and the distinction drawn by Mr. Serjt. *Onslow*, was not adverted to. His Lordship, therefore, might have considered that that case was applicable, and that the original affidavit must be produced; but I am clearly of opinion that in this case there is no ground for a nonsuit, and that the case of *Webb v. Herne*, does not apply, because it did not appear there how an affidavit was to be proved, but merely that it must be proved, because the plaintiff had averred it in his declaration. All records may be proved by examined copies. In cases of perjury, it would be material to prove the hand-writing of the party. The distinction, in the case of *Croke v. Dowling*, is well drawn, and on the authority of that case, I think the office copy was admissible evidence for the plaintiff.

Mr. Justice BURROUGH.—In the case of *Webb v. Herne*, no distinction was made between original and office copies; and in *Croke v. Dowling*, it is stated, that if an affidavit were made by the party himself, perhaps it would be necessary to produce the original, but the general rule must prevail in this case. It is enacted by the 12 G. 1. c. 29., “that an affidavit of debt must be made and filed.” If, therefore, the originals were taken from the office, it might be productive of great inconvenience.

Rule absolute.



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*SOLLY, et al., v. FORBES and ELLERMAN.

The court will not set aside a declaration against one defendant, the other having been outlawed, on the grounds that such outlawry was irregularly obtained, and that the declaration was delivered at the same time, as a bill of particulars, which was insufficient; and that another order was afterwards obtained for better particulars: as the application, by the defendant, who was in court by his bail, went to impeach the outlawry against the other, who was not before the court, and that as the defendant's attorney had not returned the declaration with the insufficient particulars he had waived the irregularity.

In this case, Mr. Serjt. *Best*, had obtained a rule *nisi* to set aside the declaration against *Forbes* (*Ellerman* having been outlawed,) for irregularity, on two grounds—*first*, that the outlawry was irregularly obtained, and not warranted by the original writ: and, *secondly*, that the declaration was delivered at the same time as the particulars of the plaintiff's demand, which particulars were insufficient, and another order was afterwards obtained for better particulars.

Mr. Serjt. *Bosanquet*, on showing cause, submitted that the defendant, *Forbes*, was too late in his application, to set aside the declaration; but as to the first objection, the court would not entertain the motion which appeared to be made on behalf of the defendant, who had been arrested, and was in court by his bail, which went to impeach the outlawry against the other defendant who was not before the court: and Mr. Serjt. *Best*, not then urging the second objection, the rule was discharged with costs; but on its being mentioned again

on the same day, the court, at first, seemed to think it well founded, but afterwards said, that as the defendant's attorney did not return the declaration so delivered, with the insufficient particulars, that by keeping it he had waived the irregularity, and therefore refused to alter the rule, which was consequently

Discharged with costs.

*LOWDEN, et al., v. HIERONS.

[*102

By a grant of 22 Car. 2. to the Earl of Bedford, of a liberty to hold a market in *Coven Garden*, and to receive the accustomed dues and tolls, &c. to such market belonging, but to which no specific tolls were annexed: it seems that no tolls can be claimed, although such market be regulated as to tolls, &c. by a subsequent statute; and the jury having given a verdict on evidence, which did not show that any uniform tolls had been paid or collected, but that the defendant merely offered to pay a certain sum: The court granted a new trial, principally for another jury to say, whether, subsequent to the original charter, they could presume a new grant from the crown containing a specific right to tolls.

*NATHAN v. BUCKLAND.

[*153

In an action of trover, where the question was, whether goods were the property of the plaintiff alone or jointly with *I. S.*—Held, that whether *I. S.* were admissible as a witness to prove this fact or not, yet, that as the plaintiff and *I. S.* had made joint orders for the disposition of the goods, the plaintiff alone could not recover.

THIS was an action of trover, brought to recover the value of one hundred and eighteen barrels of flour, delivered to the defendant by the order of the plaintiff.

At the trial of the cause before Mr. Justice Burrough, at Guildhall, at the sittings after the last term, after the plaintiff had made out his case, the defendant rested his defence on the ground of the flour being the joint property of the plaintiff and a person by the name of Gray, captain and part owner of a ship named the *Voast*, in which the flour came from *Gibraltar* to *London*. On Gray's being called as a witness to prove this fact, his admissibility was objected to, *in limine*, by the plaintiff's counsel; but the learned judge having heard the objections, admitted him to be examined, when he swore positively that the flour was purchased by himself, on the ship's account, and that the plaintiff assented to the sale of it, for the discharge of a claim made against the partnership, by a person of the name of Ransom, for money borrowed of him for the purchase of the flour, and that the defendant was ordered by Gray, to sell the flour and pay the debts of the vessel. It was also proved, that there was a written and joint order of Gray, and the plaintiff to pay the proceeds of the flour to Ransom, and a receipt given by him on account of an order on the defendant, drawn by Messrs. Nathan & Gray, owners of the *Voast*. It was also proved, by the clerk of the defendant, that the plaintiff and Gray, came together to the defendant's counting-house, and mutually agreed that he should dispose of the flour for their joint benefit. On this testimony the learned judge directed a nonsuit, but gave the plaintiff liberty to move to set it aside, if the court should be of opinion that Gray, was inadmissible as a witness.

Mr. Serjt. Best, on a former day in this term, had obtained a rule nisi, that

this verdict should be set aside and a new trial granted, and insisted that this case was not to be distinguished from that of *Bland v. Ansley*, 2 New Rep. 331, and that the effect of *Gray's* testimony was to make him liable to pay the debts of the ship, and that if the case had gone to the jury, the defendant could not have obtained a verdict but for the evidence of *Gray*.

Mr. Serjt. *Vaughan* now showed cause, and submitted that as the documents given in evidence for the order of the delivery of the flour were in the joint names of the plaintiff and *Gray*, they were alone sufficient to deprive the plaintiff of his right to recover in this action, and would be competent evidence to support a verdict in case it had been left to the jury, independently of the testimony of *Gray*; that in order to maintain this action the plaintiff should have proved exclusive property in the flour, and that, as it was quite clear that *Gray* was interested therein, the nonsuit was perfectly correct; that his evidence might be left out of the question, as the defendant's clerk had proved that both the defendant and *Gray* had claimed an interest in the flour, and that it was disposed of at their joint request.

Mr. Serjt. *Best*, in support of the rule, premised that the question in this case turned entirely on the admissibility of *Gray* as a witness, and that notwithstanding the documents produced at the trial, his evidence was most material; that if his testimony had been rejected, and the case had gone to the jury, they would have found a verdict for the plaintiff, and that the joint property in the flour was proved solely by *Gray* himself; that if the jury had found a verdict for the defendant, such verdict could not stand, as the most important facts of the case were proved by *Gray*, which were likely to operate on the minds of the jury; that this case, therefore, came within the principle laid down in *Bland v. Ansley*, where it was held, that in an action of trespass against a sheriff, where the question was, whether goods which had been taken in execution in a suit against *A. B.* belonged to him or to the plaintiff, *A. B.* was not allowed to be witness for the defendant, to prove the goods his property, since he would have been discharged from his debt in case of a verdict for the defendant.

Mr. Justice DALLAS.—It is quite impossible to make this rule absolute. It is unnecessary to consider whether this witness ought to have been rejected or not; for if he were inadmissible, the only effect would be to send the cause to a new trial. If he had not been called, I think there would not only have been sufficient evidence to warrant the jury in finding a verdict for the defendant, but that such verdict might be supported. I perfectly agree with my brother *Best* in the distinction he has drawn, that if he had been admitted as a witness, and alone proved the facts of the material parts of the case, unconnected with the testimony of any other witness or explanatory evidence, that it might tend to operate on the minds of the jury, but in this case I think the written orders for the joint disposition of the property were sufficient to prevent the plaintiff alone from recovering in this action. If, therefore, there be sufficient evidence to warrant a verdict without the admission of a witness who has been improperly received, the court, looking into the circumstances of such particular case, will not set aside the verdict. *Harford v. Wilson*, 1 Taunt. 12.

Mr. Justice PARK.—The court will assume, for the purpose of the argument, that this witness was improperly admitted at the trial. In *Edwards v. Evans*, 3 East, 451, it was held to be no ground for the court to grant a new trial, that a witness called to prove a certain fact was rejected on a supposed ground of incompetency, where another witness, who was called, established the same fact, which was not disputed on the other side. The proof that *Gray* was jointly interested with the plaintiff in the property for which this action was brought, did not depend on his testimony alone; for it was proved by the defendant's clerk, and by the written documents, that he was connected with the plaintiff in the disposition of the property.

Mr. Justice BURROUGH.—My brother *Best* has contended that there was no

order and disposition of the flour by the plaintiff and *Gray* jointly. These facts, however, were clearly proved without *Gray's* testimony; and I am, therefore, of opinion that this action cannot be maintained.

Rule discharged.

*GODSON, gent. one, &c. v. Sir WILLIAM SMITH, bart., et al. [*157

If in an action of *assumpsit* improperly brought against an administratrix, she plead in abatement, that others were jointly liable, which she failed to prove, in consequence of which the plaintiff recovered a verdict with 1s. damages.—*Held*, that such verdict did not amount to satisfaction, so as to bar the plaintiff from recovering against the other contractors.

THIS was an action of *assumpsit*, brought by the plaintiff, as an attorney, to recover the amount of his charges for the preparing, framing, presenting, and prosecuting petitions and bills to parliament, and conducting an opposition therein. The defendants pleaded, *first, non-assumpsit; secondly, non-assumpsit infra sex annos*; and, *thirdly*, judgment recovered against one *Sarah Good*.

At the trial of the cause before Mr. Justice *Park*, at the sittings at *Westminster*, in the last term, on the examination of the plaintiff's son, a verdict was found for the plaintiff, damages, 2000*l.*, subject to the determination of an arbitrator, who made the following award, which set out these facts.—About two years ago, the plaintiff brought an action in this court, 2 *Marsh.* 299, against one *Sarah Good*, as administratrix of one *Samuel Good*, deceased, for the very same causes of action as are set forth in his declaration in this suit. *Sarah Good* pleaded in abatement, that her intestate made the promises and undertakings, if at all, jointly, with the present defendant, Sir *William Smith*, and sixteen others. This was denied by the plaintiff in his replication, and issue was joined thereupon.—At the trial of the cause, the same evidence which proved the promises to have been made by the intestate jointly, with the seventeen named, proved, also, that they were made jointly with nearly forty persons besides.—The jury found a verdict with 1s. damages for the plaintiff, being directed by the learned judge who tried the cause that they must find for the plaintiff, as the defendant had failed to prove her plea; but that nominal damages only could be given, inasmuch as the administratrix was not liable at all; but the right of action survived against the other contractors. That that verdict was given before the commencement of the present suit. That the plaintiff taxed his costs, and entered up satisfaction on the record.—He then awarded, that if these proceedings were, in law, a bar to the present action, on the general issue, the verdict should be for the defendants; if not, that it should stand for the plaintiff; but that the damages should be reduced to 460*l.*; and that in either case the parties should pay their own costs.

As by this award a point of law was raised for the opinion of the court, what damages were to be recovered:

Mr. Serjt. *Lens*, on a former day in this term, had obtained a rule *nisi*, that the verdict found for the plaintiff should be entered for 460*l.*, and,

Mr. Serjt. *Best*, on the same day had also obtained a rule, that this verdict should be set aside and entered for the defendants.

Mr. Serjt. *Best*, and Mr. Serjt. *Vaughan*, now showed cause against the first rule, which had been obtained by Mr. Serjt. *Lens*, and submitted that the verdict must be entered for the defendants, on the ground that the plaintiff, having recovered a judgment and 1s. damages in the former action, against Mrs. *Good*,

must be deemed a satisfaction and bar to the present suit. The arbitrator himself has stated in his award, that the plaintiff brought his action against her for the very same causes of action as are set forth in his declaration in this suit.—The verdict in that action was given before the commencement of the present, but judgment was signed afterwards, and the plaintiff taxed his costs accordingly. He has, therefore, made his election, by having taken the judgment and costs. Both the justice and law of the case are with the defendants. These costs were paid by the same party, and recovery is sufficient without satisfaction. Both actions grew out of an application to parliament; and having commenced the former one against the representative of a deceased joint contractor, the plaintiff now calls upon the defendants to pay the damages and costs, although he has recovered damages in the action brought against Mrs. Good, and there has, therefore, not only been a recovery but satisfaction; and when the damages are liquidated, if one farthing be recovered it is sufficient. They cited *Markham v. Middleton*, 2 Strange, 1259.—*Ferrars'* case, 6 Rep. 7-9.—*Brown v. Wotton*, Cro. Jac. 73. Yelv. 67, S. C.—*Outram v. Morewood*, 3 East, 346.—*Duchess of Kingston's* case, 11 State Trials, 261.

Mr. Serjt. *Lens*, and Mr. Serjt. *Copley*, in support of the rule, were stopped by the court.

Mr. Justice DALLAS.—We shall decide this case, on the special ground, as stated in the award; and the only question is, whether the proceedings that have taken place in the former action will, in law, bar the plaintiff from recovering in the present. It appears quite clear, on the face of the award, that if these proceedings be not a bar, the defendants are liable in damages to the plaintiff to the amount of 460*l*. It has been contended, that although the former action was improperly brought against a person who could not be responsible in her representative character, still, that as she had failed to prove a plea that had been wrongly pleaded, and the jury having found a verdict with 1*s*. for nominal damages, that such damages would be a bar to the present action, although they cannot be considered as a satisfaction for the damages the plaintiff was entitled to recover. There can be no doubt but that if a plaintiff recover satisfaction in one action, he cannot proceed for the same cause in a second. No authority has been cited to show that the damages in the first action amount to such a satisfaction, as may be pleaded in bar to the present. The first action was improperly brought against a defendant, as administratrix, to whom, as such, no liability could attach. She, however, having failed in proof of a plea in abatement, was deemed to be liable to nominal damages; therefore, that verdict could not be used as a satisfaction adapted to the subject of the demand in the present, for she was liable to nominal damages, merely on account of having pleaded an improper plea.

Mr. Justice PARK.—I am entirely of the same opinion. If the plaintiff had replied as in the case of *Seddon v. Tupot*, 6 Term Rep. 607, this case would have fallen within the principle there laid down by Lord Chief Justice *Kenyon*, where he said, "That the issue was, whether the damages demanded in that action had been already satisfied by the recovery in the former action;" and he thought most clearly they had not, and distinguished that case from *Markham v. Middleton*; and though the jury gave inadequate damages for that demand, on account of the plaintiff's not being prepared with the proof of his whole bill, yet he would have been barred by that verdict, if it had stood. But in that case there were two distinct demands, not in the least blended together; and it was there clearly shown, that the demand was not inquired into in the former action; so the plaintiff's demand in this case was not inquired into in the action brought against Mrs. Good, for, as her plea was bad in form and not proved, the plaintiff was merely entitled to recover nominal damages. And in *Seddon v. Tupot*, Lord *Kenyon* also says, "that on executing the writ of inquiry in the former action, evidence was only given on the first demand; that the plaintiff recovered damages adapted to that demand, and that the other demand for the goods still

remained unsatisfied. I, therefore, think that the plaintiff is entitled to recover the amount of the damages found by the arbitrator in his award.

Mr. Justice BURROUGH.—If the proposition contended for, were to be granted, it would be a reproach to *Westminster Hall*. It requires very little explanation to show that there was in fact no recovery by the plaintiff in the former action, for he could not possibly have obtained satisfaction in that action, because he had sued a defendant who was not liable to pay any part of the sum demanded. It does not appear by the award, that the damages found for him amounted to satisfaction, but one shilling was merely awarded to him as nominal damages, by the direction of the judge, in consequence of the defendant's failure to prove her plea. If, therefore, this verdict were entered for the defendants, it would not only be in contradiction to the award, and against the case of *Seddon v. Tupot*, but would be in direct violation of the principles of justice and the rules of common sense.

Rule absolute.

The other rule obtained by Mr. Serjt. *Best*, for entering the verdict for the defendant, was consequently

Discharged.



*GWYNN, demandant; HEATHCOTE, tenant; CAMFIELD, [*163
vouchee.

In a deed to lead the uses, the lands were described as one hundred acres, more or less; a recovery was suffered for one hundred and ten; the court admitted it to be amended by increasing it to one hundred and twenty, as it would not augment such lands beyond the terms of the deed.



EASTER TERM, 58 GEO. III. 1818.



*HOWARD v. LEATH et ux.

[*174

The court permitted a fine to pass, which ought to have been perfected six years since, on an affidavit which stated that the delay was owing to the negligence of the agent in *London*, with whom the necessary instruments for its completion had been deposited.



*NEWBURY v. EMMETT.

[*175

If a person in custody, at the suit of a third person, obtain a day rule, and execute a warrant of attorney at the office of the solicitor of the party to whom the instrument is to be given: Held, that the presence of the prisoner's attorney is not necessary at the time of such execution.

*BRANDT, Administrator, v. HEATIG.

The property of an intestate was assigned to the assignees previous to his death: the plaintiff administered, and applied to the defendant for payment for goods sold him by the intestate, in the name of the assignees, and afterwards brought an action in his character of administrator.—Held, that such action was well brought.

THIS was an action of *assumpsit* brought by the plaintiff as administrator of one *Dorrbecker*, to recover the sum of 753*l.* due from the defendant to the intestate, for goods sold and delivered by him in his life-time, and on an account stated. At the trial of the cause before Mr. Justice *Dallas*, at the sittings at *Guildhall* after the last term, the question was whether the plaintiff was entitled to sue as administrator, or whether, according to the statement of his own case, and a letter dated the 24th of *February*, 1816, from the plaintiff to the defendant, the property was in the hands of the intestate or his assignees.

The letter was in these terms:—

“SIR,”

“In consequence of a full power received from the assignees to the estate of Mr. *Dorrbecker* at *Archangel*, I beg to apply to you for the payment of the balance due to the same. You will be kind enough to give me your immediate reply, which I hope may lead to an amicable adjustment, being directed, in case of a refusal, to adopt legal measures to enforce the payment.”

Signed by the plaintiff.

The learned judge was inclined to think that the action should have been brought in the name of the assignees.

The jury gave a verdict for the plaintiff for the whole amount of his demand, but leave was given the defendant to move to enter a nonsuit in case the action should have been so brought.

Mr. Serjt. *Lens*, now moved accordingly, and contended, that by the terms of the letter, although the plaintiff might conceive that he was entitled to bring this action as the representative of the intestate, still that no property vested in him, and that the action should have been brought in the names of the assignees, as the plaintiff had acknowledged that the property of the intestate was vested in them.

Lord Chief Justice GIBBS.—If this action had been brought in the name of the assignees, they would have been nonsuited, this debt being in the nature of a *chose in action* not assignable, and although it might have been assignable, still the administrator had a right to bring this action. If a bond be assigned by an intestate, and he die, his administrator only is entitled to sue on it. In this case there was no proof of the assignment. The plaintiff deduced his title as administrator, and although the intestate assigned his property, still it may be inferred that the assignees authorized the administrator to sue.

Rule refused.

***HOLLOWAY, Administratrix of HOLLOWAY, deceased, v. LEE, sued by the name of DE BLAQUIRE.**

Where a married woman has been arrested as acceptor of a bill of exchange, at the suit of an administratrix, to whose intestate the bill was indorsed, the court will order the bail-bond to be cancelled, on affidavits, that the drawer and intestate knew, at the time the bill was drawn, accepted and transferred, that the defendant was a married woman.

MR. Serjt. *Vaughan*, on a former day in this term, had obtained a rule nisi, that the bail-bond in this action might be delivered up to be cancelled, and the defendant discharged on entering a common appearance, on an affidavit of the defendant, which stated that she was arrested at the suit of the plaintiff, as administratrix of *Charles Holloway*, deceased, for 40*l.*, on a bill of exchange, drawn by one *Scott*, on, and accepted by the defendant, in the name of *De Blaquire*, and indorsed by *Scott* to the intestate; that the defendant, at the time of the acceptance, had been married to one *Francis Lee*, then and still her husband; that *Scott*, the drawer, was aware, at the time he drew the bill, that the defendant was a married woman; that in 1811, the defendant was divorced from her husband, and then signed an undertaking not to use the name of *Lee*, and that she hath ever since used the name of *De Blaquire*, except when necessary for legal purposes to adopt the name of *Lee*, and that she had never received any value for the bill. The drawer also swore, that at the time he drew the bill, and the defendant accepted it, he was aware that she was married to *Lee*; that he applied to the intestate to discount the bill, and at the time of doing so, informed him that the defendant was married, and that her real name was *Lee*; and that on such representation, the intestate advanced 10*l.* only on the bill, and the drawer had received no farther consideration for it, and the defendant had received no value of him for the same.

MR. Serjt. *Copley*, now showed cause, and submitted, that the court could not interfere to discharge the defendant out of custody; that it was uncertain whether the intestate knew the defendant to be married at the time he discounted the bill, and that the plaintiff, as administratrix, must be wholly ignorant of that circumstance.

MR. Serjt. *Vaughan*, in support of the rule, relied on the case of *Collins v. Rowed*, 1 New Rep. 54., where a feme covert was discharged on a common appearance, though she contracted the debt as a feme sole, and was trusted by the plaintiff as such, unless she represented herself to be single. And,

Per curiam.—Both the drawer, and the intestate who discounted the bill, were aware that the defendant was a married woman. Although the plaintiff sues as administratrix, it cannot vary the rights of the parties; and, as all the facts were known to the intestate, no imposition has been practised and therefore, this rule must be made

Absolute.†

† But see *Pitchard v. Cowlam*, 2 Marsh, 40, where the court refused a similar application, in an action at the suit of an indorsee, on an affidavit that the drawer, when he drew the bill, knew the defendant to be a married woman.

*BRAY v. HALLER.

If the affidavit of the truth of a plea in abatement be insufficient, the court will not set aside the plea, as the plaintiff might have treated it as a nullity, and signed judgment.

MR. Serjt. *Onslow*, moved for a rule *nisi*, that the plea in abatement, which the defendant had pleaded in this cause, might be set aside for an irregularity in the affidavit of the truth thereof. The irregularity complained of was, that the defendant had described himself to be of "*Clifford's*, in the city of *London*," instead of "*Clifford's Inn*," and he insisted that this was no substantive addition. But,

The court, held, that as the affidavit was insufficient in terms, the plaintiff might have considered the plea as a nullity, and signed judgment.

Rule refused.

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*FERRERS, Clerk, v. WEALL.

Where the defendant plead six several pleas, and the plaintiff did not reply to the last, but left it wholly unnoticed in the record, which he was aware of before trial, and a verdict was found for the plaintiff for nominal damages, subject to an award of an arbitrator, who found for the plaintiff on the first and second issues, and for the defendant on the third, fourth, and fifth, without prejudice to the objection on the record. Held, that the plaintiff could not amend by adding a traverse and *similiter* to the sixth plea; and that the defendant was not entitled to arrest the judgment, as he might bring a writ of error.

*220] *CARDOZO v. HARDY et al., Executors of DE PIZA, deceased.

An action of debt was commenced in *Michaelmas* Term against executors and a bond of their testator, conditioned for making it void on payment of a certain sum at a future day, or within one month after his decease, whichever should first happen, and a rule to plead was as of that term given. The defendants, in the following vacation, obtained a judge's order for time to plead, which they neglected to do, and final judgment was signed for want of a plea, which was set aside in the next *Hilary* Term, on the defendants' undertaking to plead within a week, when they pleaded a judgment recovered against them as executors, which not being signed by a serjeant, the plaintiff again signed final judgment:—Held, first, that it was unnecessary to suggest breaches under the statute 8 & 9 W. & M. c. 11. s. 8; and secondly, that no rule to plead, as of *Hilary* Term was necessary, nor was a demand of plea required.

MR. Serjt. *Vaughan*, on a former day in this term, had obtained a rule *nisi*, that the final judgment which had been signed in this cause might be set aside; and that the defendants might be at liberty to amend their plea, on an affidavit which stated that this action was commenced in *Michaelmas* term last, to recover the sum of 856*l.*, for principal and interest due on a bond of the testator to the plaintiff, in the penal sum of 1,245*l.* 15*s.* 4*d.* conditioned for making the same void on payment of 622*l.* 17*s.* 8*d.*, on or before the 3*d.* of *May*, 1830, or within one month after the decease of the testator, whichever period should first and next happen, together with interest for the same, at the

rate of 5*l.* per cent. in the mean time. That final judgment was signed in this cause for want of a plea, on the 20th of *December* last, which was set aside for irregularity in the last term, and that a rule to that effect was accordingly obtained, which also ordered, that the defendants should have a week's time to plead. That in pursuance of such rule the defendants pleaded, first *plene administraverunt*, and secondly, a judgment recovered, which were duly filed; but that the latter plea having been signed by Counsel instead of a Serjeant, the plaintiff treated it as a nullity, and signed judgment on the 13th of *February*, as of *Hilary* term last, on which he issued execution, and levied on the goods of the defendants. That no rule to plead was given in *Hilary* term last, nor any demand of plea made before the signing of the final judgment. The learned Serjeant founded his motion on three objections: First, that a suggestion was necessary, as the bond was within the statute 8 & 9 *Will.* 3. c. 11. s. 8: Secondly, that a rule to plead ought to have been entered in *Hilary* term; and lastly, that a plea should have been demanded before the judgment was signed.

Mr. Serjt. *Copley*, now showed cause on an affidavit which stated, that the declaration in this cause was delivered on the 22d of *November* last, and that on the same day, a rule to plead was duly entered. That on the 8th of *December*, the defendants obtained a Judge's order for ten days' time to plead after delivery of the particulars of the plaintiff's demand. That the particulars were delivered on the 9th of *December*, and final judgment for want of a plea was signed on the 20th. That on the 7th of *January*, Mr. Justice *Park*, made an order, that all proceedings on the judgment should be stayed till the next *Hilary* term, on the first day of which the defendants obtained a rule *nisi*, that the judgment should be set aside for irregularity; and that on the 4th of *February* following, it was accordingly set aside, the defendants undertaking to plead within a week from that day, and that in case a verdict should be found for the plaintiff, he might be at liberty to enter up final judgment as of that *Hilary* term. That on the 7th of *February*, the defendants confessed a judgment in an action against them as executors, at the suit of one *Mary Taylor*, (the mother of one of the defendants) in the Court of King's Bench, by pleading *plene administraverunt* to such action, except as to 2*5l.* That on the 11th of *February*, the defendants pleaded *plene administraverunt*, and the judgment so confessed by them in favor of *Taylor*, in bar to this action; but that the latter plea not having been signed by a Serjeant, final judgment was signed on the 13th.—As to the first objection, the learned Serjeant contended, that a suggestion was unnecessary, as the instrument in question was in the nature of a *post obit* bond; and that in *Wardell v. Fermor*, 2 Camp. 282, where there was a suggestion under the statute, in an action of debt on a similar instrument, it was considered quite superfluous; and as to the second and third, he submitted, that as the defendants had obtained time to plead on a Judge's order, a rule to plead was unnecessary, Impey's C. P. 6th edit. 219; and that the same rule was applicable to the demand of a plea; and he referred to the cases of *Baker v. Hall*, 1 Taunt. 538, and *King v. Taylor*, Impey's C. P., 6th edit. 221. The plaintiff, therefore, has been guilty of no irregularity, and as there was no signature of a Serjeant to the latter of the defendants' pleas, the judgment was properly signed.

Mr. Serjt. *Vaughan*, in support of the rule, insisted, that a suggestion was necessary, as this was not a *post obit* bond, as it was conditioned for payment, either on the 3d of *May*, 1830, or within one month after the decease of the obligor. Besides there was nothing on the record to show that he was dead, and it was not only necessary to be averred, but proved. In *Wardell v. Fermor*, the bond was payable on one event, *namely*, the death of the party; but here, in case he survived till *May* 1830, it would be payable at all events. Even although a rule to plead was unnecessary, still a demand of plea was absolutely requisite. But,

Per curiam. This is not like the case of an annuity, which ceases after

the death of the party. Here, the condition of the bond was to pay a certain sum within one month after the decease of the obligor. It was unnecessary to suggest his death on the record. The defendants had not pleaded in time, but afterwards confessed a judgment against them as executors. They, therefore, became parties to the record as such. This judgment, too, was confessed after time to plead had been given, and it is quite clear that under the circumstances, neither a rule to plead as of *Hilary* term, nor a demand of plea was at all necessary.

Rule discharged with costs.

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*BALLAM v. PRICE and PAYNE.

The plaintiff obtained a verdict in trespass against two defendants. Both were arrested on a joint *ca. sa.* for the amount of the damages. One was discharged on giving a promissory note to the plaintiff, payable by instalments:—Held, that this operated to discharge the other.

Mr. Serjt. *Copley*, on a former day in this term, had obtained a rule *nisi*, that the defendant *Price*, might be discharged out of the custody of the Warden of the *Fleet*, on an affidavit which stated that both the defendants had been arrested upon a joint *capias ad satisfaciendum* for 61*l.*, being the amount of a verdict and costs obtained against them by the present plaintiff in an action of trespass; and that *Payne* had been discharged out of custody, on having given a warrant of attorney, to pay the whole amount of such verdict and costs, by monthly instalments.

Mr. Serjt. *Onslow*, now showed cause, on an affidavit, stating that *Payne* had not given a warrant of attorney, but that he had obtained his discharge on giving a joint and several promissory note of himself and one *Redman*, for the amount of the damages and costs of the action, together with costs subsequently incurred, payable by instalments of 1*l.* 10*s.* per month, for the first three months, from the date thereof, and after the expiration of that time, at 2*l.* per month, until the whole was paid; and that if default was made in payment of either of the instalments, that the plaintiff might sue for the full amount, or for so much thereof as should remain unpaid. He contended, that although it was laid down in the case of *Clarke v. Clement*, 6 Term Rep. 525, that if the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.*, he cannot afterwards retake him or any of the others, yet that the defendant there undertook to render himself on a given day, if he did not pay the debt in the mean time. That in fact amounted to a release. In *Merryweather v. Nixan*, 8 Term Rep. 186, a distinction was drawn between cases of assumpsit and tort; and it was there established, that one of several wrong doers, who had been compelled to satisfy the entire damage sustained, cannot claim contribution against the others. Here the original action was trespass, and therefore, the discharge of *Payne* will not operate on the defendant *Price*. Besides *Payne* merely gave a contingent security payable by instalments; the plaintiff, therefore, had a right to detain *Price* in custody, until the whole of these instalments had been duly paid. But,

Per curiam. It is quite clear that the discharge of one operates as the release of both the defendants. The plaintiff cannot be entitled to receive his damages twice, nor can he have double satisfaction. Having obtained judgment against both the defendants, he took the promissory note of one in full satisfaction of the debt. This, therefore, operated as a discharge of both.

Rule absolute.†

† See *Nadin v. Battie*, 5 East, 147, where it was held, that a discharge under an insolvent act, of one of two joint defendants in execution, would not operate to discharge the other, the release of the former not being with the actual consent of the plaintiff.

*GREENAWAY, Vouchee.

A recovery may be amended by substituting the parish of *A.* for *B.*, if the deed to lead the uses comprehends all the estates of the demandant, situate in the county where such parishes lie.

*KEMP v. RICHARDSON.

[*238]

In a declaration of trespass, containing six counts, two only were founded on the statute 8 Hen. 6. c. 9. s. 6. Judgment having gone by default, the plaintiff obtained general damages on a writ of inquiry, and 6*d.* costs. Treble costs having been taxed for the plaintiff on all the counts in the declaration. Held, that he was not entitled thereto, but would only enter his judgment on the counts at common law, and with single costs.

This was an action of trespass. The declaration contained six counts, the third and fourth of which were founded on the stat. 8 Hen. 6. c. 9. s. 6, for a forcible entry, in the one of which it was alleged, that the plaintiff was tenant from year to year only, and the other was framed on a possession generally, without averring he had a freehold. The defendant suffered judgment by default; a writ of inquiry was afterwards executed, and the plaintiff obtained 30*l.* general damages, and sixpence costs. The prothonotary on the taxation of the costs of increase, considered the plaintiff as entitled to treble costs, and allowed them on the whole of the declaration, without making any distinction as to any particular counts therein.

Mr. Serjt. *Hullock*, on a former day in this term, had obtained a rule *nisi*, that it should be referred back to the prothonotary to review his taxation, on two objections. First, that the damages having been taken generally, the plaintiff was not entitled to enter his judgment for treble damages, under the statute; and secondly, That the statute merely protected persons who might be disseised, or have freeholds, and did not extend to tenants for years. That at all events the prothonotary ought only to have taxed treble costs upon those counts which were founded on the statute, and not generally on the whole declaration.

Mr. Serjt. *Blosset*, now showed cause. Although the counts in the declaration, founded on the statute, might have been insufficient in point of law for the plaintiff to have maintained his action, still it can afford no ground of objection as to the taxation of costs. The defendant might have demurred. But the fourth count did not state what estate the plaintiff had in the premises, it may, therefore, be presumed he had a freehold. Though there were several counts in the declaration, the finding was general, and the plaintiff, therefore, was entitled to treble costs as taxed. But,

Per curiam. Two counts of the declaration only were founded on the statute, the plaintiff, therefore, cannot be entitled to treble costs on the whole of the declaration. Such costs were only recoverable by operation of the statute. See *Brooke's Abridgment*, Action on the Statute, fol. 9. pl. 17. And under these circumstances we think the plaintiff is entitled to enter his judgment on the counts at common law alone, and with single costs.

Rule absolute accordingly.

*299] *WHITE, Demandant; BICKNELL, Tenant; PAPILLON, Vouchee.

A recovery may be amended by inserting the "great and rectorial tithes belonging to a manor," if they be contained in the deed to lead the uses, although the king's silver were not paid for such tithes, at the time the recovery was suffered.

TRINITY TERM, 58 GEO. III. 1818.

*474] *SMITH Executor of WHITTINGHAM, v. EVANS.

If a defendant give in evidence, a commission of bankrupt at the trial, and a receipt given by the assignees to prove payment of a sum of money from him to them, and the judge is inclined to think such proof sufficient; if the defendant afterwards attempt to prove the validity of the commission, and fails, and the jury find a verdict for the plaintiff: Held, that the defendant is precluded from disturbing it.

MICHAELMAS TERM, 59 GEO. III. 1818.

*642] *WARD (Widow) v. CREASEY, et al.

A plaint was removed into this court by *re. fa. lo.* on the part of the defendants in replevin, tested on the 13th of May, and returnable on the 7th of June. There was no county court-day between the teste and the return. No rule to declare was served on the plaintiff, or demand of declaration made. The defendant signed judgment of *non pros.* The court set it aside, as well as the subsequent proceedings, without costs, on the plaintiff's undertaking to declare on the *re. fa. lo.*

*665] *IN *re* LAWRENCE.

If a sum of money be paid to an attorney, for the purpose of levying a fine, and he neglect to do so, whereby the party is put to the expense of levying another, the court will not order such sum to be repaid by the attorney; as his bill might have been taxed, when it was discovered that the fine had not passed; and they left the party to his remedy by action.

WINTER v. MUNTON.

*723] *SAME v. WHITE.

By an order of reference, all matters in difference in a cause between A. and B., were referred to an arbitrator, and by a subsequent order, C. was made a party thereto; and it was directed, that all matters in difference between A. B. and C. should be referred

to the same arbitrator : and that the costs of the suits should abide the event of the award.—The arbitrator made two awards, in the one of which he awarded, that *A.*, at the date thereof, was indebted to *B.*, without mentioning *C.* ; and in the other, that *A.* was indebted to *C.* without mentioning *B.*—Held, that both these awards were bad, as he had not decided all the matters in difference between all the parties.

By an order of reference, made in the first of these causes, all matters in difference were referred to an arbitrator ;—and the costs of the suit, and of a suit in equity, with the costs of the reference, were to abide the event of the award :—and by a subsequent order, it was directed, that the cause which had been previously referred, and on which reference some steps had been taken, should be proceeded in, as if the defendant *White*, had been a party to the original order at the time the same was made ; and that the award to be made pursuant to such submission, should be as binding and effectual upon and with reference to *Winter, Munton, & White*, and each and every of them, as if *White* had been a party to the original order :—and that the cause of *Winter v. White*, and all matters in difference between *Winter, Munton, & White*, and each and every of them, jointly and severally, and as co-partners or otherwise, should be referred to the award and determination of the same arbitrator, so as he should make his award in writing, of and concerning the matters referred, on or before a certain day therein specified, and that the parties should fulfil and keep such award ; and that the costs of the suits, and of the suit in equity, and the costs of the reference, should abide the event of the award.—The arbitrator, in the cause of *Winter v. Munton*, awarded that *Winter*, at the date of the award, was indebted to *Munton*, in the sum of 429*l.* 8*s.* 0*d.*, being the balance which he found to be due from *Winter* to *Munton*, as well upon their respective proportions in the co-partnership accounts, as otherwise ; and he ordered that *Winter* should pay the above sum to *Munton*, on a certain day therein specified.—He also made an award in the cause of *Winter v. White*, as to the balance due from the one to the other, in the same terms as in the above cause of *Winter v. Munton*, and in which the name of the latter was not introduced.—It appeared by affidavits, that the accounts between the parties were so intricate, that two accountants were called in to assist the arbitrator, by which it appeared, that in the case of *Winter v. Munton*, there was a balance due from the latter to the former, and that the arbitrator had afterwards admitted, that the accounts had been correctly taken by the accountants, when one of them pointed out to him an error he had made in one item of 400*l.*, when he said he would review his award.

Mr. Serjt. *Lens*, on a former day in this term, obtained a rule *nisi*, that the award in *Winter v. Munton*, might be set aside ; and Mr. Serjt. *Best*, obtained a similar rule in the cause of *Winter v. White*,—on the grounds, that the effect of both the orders of reference was to consolidate the two causes, and make one submission only of all matters in difference between all the parties, upon which there should have been but one award ;—whereas one of the awards was confined to the plaintiff and *Munton*, in which no notice whatever was taken of *White*, and the other related only to the disputes between *Winter & White*, omitting the name of *Munton*. In addition to this, the arbitrator determined that *Winter*, was indebted to *Munton*, at the date of the award, and not at the time of the reference ; and it further appeared by affidavit, that after the evidence before the arbitrator was closed, papers had been delivered by the defendant's attorney to him, which the plaintiff had not the opportunity of seeing ; and lastly, the arbitrator himself admitted, that he had made an error as to one of the items in the account, and therefore his determination could not be considered as final.

Both rules now came on together, when,

Mr. Serjt. *Rosanquet*, and Mr. Serjt. *Taddy*, showed cause, citing *Gray v. Guennep*, 1 Barn. & Ald. 106.—*Simon v. Gavil*, 1 Salk. 74.—*Banfill v. Leigh*, 8 Term. Rep. 575.

Mr. Serjt. *Lens*, and Mr. Serjt. *Best*, in support of their respective rules cited *Caldwell* on arbitration, Page 100.

Lord Chief Justice DALLAS.—By the first order of reference, all matters in difference in the cause between *Winter & Munton*, were, by consent, referred to an arbitrator; and by the second, *White* was made a party. It has been contended for the plaintiff, that the arbitrator was not authorised to decide differences between the plaintiff and *Munton*, and the plaintiff and *White*, separately, but generally between them all, as co-partners in trade; and that both *White & Munton*, should have been joined in one award. It does not appear that there were any matters in difference, or cross demands, between *Munton & White*. Under these circumstances, I am of opinion, that the awards in question were not final, as the effect of the second order of reference was to consolidate both the causes: and there is no award determining all the matters in difference between all the parties; and the arbitrator has not decided whether, at the time of bringing the actions against *Munton & White*, the plaintiff *Winter*, had or had not any cause of action against them jointly, neither has he stated that any differences existed between *Munton & White*. He should have decided in one award the two causes referred to him, and if there were no matters in difference between *Munton & White*, he should have recited that fact in his award, or if there were, he should have decided those differences also, in which case, perhaps, there should have been three awards. But as by the orders of reference, all matters in difference between all the parties were referred to the arbitrator, and he has made two awards:—in the one of which, he has awarded as to all matters in difference between the plaintiff and *Munton* alone, and in the other, between the plaintiff and *White*, without naming *Munton*, I am of opinion, that both these awards must be set aside.

Mr. Justice PARK, concurred.

Mr. Justice BURROUGH.—It does not appear that the arbitrator has decided on all the matters in difference referred to him, except by the introduction of the words “*or otherwise.*” Besides, by the orders of reference, the costs of the causes and suit in equity, and the costs of the reference, were to abide the event of the award, but there is no award, determining the matters in difference between all the parties, and there is nothing in either of the awards to show whether the plaintiff is or is not entitled to such costs.

Rule absolute

- ought to have been perfected six years since, on an affidavit which stated that the delay was owing to the negligence of the agent in *London*, with whom the necessary instruments for its completion had been deposited. *Howard v. Leath, et ux.* [2 Moore.] 174
4. A fine may be amended, by striking out the names of the parishes, in which the lands were erroneously described to be situated; those lands being extra-parochial. *Payne, et al., Plaintiffs; and Garrick, et ux., Deforciantes.* [1 Marsh.] 468
5. The præcipe and concord of a fine amended, by inserting the real Christian names of the deforciantes, instead of those which have been erroneously inserted. *John Grey plaintiff, and John Wainwright et ux., Thomas Wainwright, et ux., Thomas Coverdale, and Susannah his Wife, deforciantes.* [1 Marsh.] 578
6. The court will not amend a recovery, by adding the *tithes* of the premises under the word *hereditaments*; where that word does not occur in the operative part of the deed. *Garle, demandant; Oram, tenant; Mason, vouchee.* [2 Marsh.] 194
7. Fine amended by altering the surname of one of the deforciantes in the præcipe and concord, conformably to his signature in the covenant and *dedimus.* *Eye, plaintiff; Haywood, et al., Deforciantes.* [1 Moore.] 125
8. If the clerk of an attorney, employed to levy a fine, absconded, whereby the papers are mislaid, the court will permit such fine to be afterwards perfected, although the time allowed by rule of court of 7. T. 52 G. 3. be exceeded. *Moule, Plaintiff; Eyles, et ux., Deforciantes.* [1 Moore.] 125

I.

INDICTMENT.

1. Indictment on stat. 43 G. 3. c. 58. The first count states that *A.*, with a certain pistol, feloniously, wilfully, maliciously and unlawfully, did shoot at *D.*, with intent, feloniously, wilfully, and of his malice aforethought, to kill and murder him; and that *B.* and *C.* were aiding and abetting *A.* Another count states that an unknown person feloniously, wilfully, maliciously, and unlawfully, did shoot at *D.*, with intent, feloniously, wilfully, and of his malice aforethought, to kill and murder him; and that *A. B.*, and *C.* were aiding and abetting the said unknown person the felony aforesaid, in manner and form aforesaid, to do and commit; and were then and there knowing of and privy to the committing of the said felony; without alleging that they were *feloniously* present, aiding, &c. The jury acquitted

- B.* and *C.* and found *A.* guilty generally; but afterwards added that he was not the person who fired the pistol: held, that *A.* was well convicted on this indictment. *The King v. Twble.* [2 Marsh.] 466
2. *A.* is indicted for burglary, and *B.* as accessory both before and after the fact. The facts proved are, that *A.*, at the instigation of *B.*, a police officer, concerts with three others to commit a burglary, and it is agreed that *B.* shall lie in wait to apprehend the three others, and that the reward for their conviction shall be shared between *A.* and *B.* The jury find *A.* guilty of larceny only, and *B.* as accessory both before and after. *Quære*, 1st, whether, as *A.* was not to participate in the *plunder*, but only in the *reward*, he could be convicted of larceny: 2dly, whether, as *A.*, the principal, had been acquitted of the burglary, *B.* could be convicted as accessory to the larceny. *The King v. John Dannelly, and George Vaughan.* [2 Marsh.] 571

INFANT.

- The court will not oblige an infant plaintiff to give security for costs. *Anonymous.* 4

INSOLVENT.

- If a creditor, previously to the discharge of an insolvent debtor, request him not to include his debt in the schedule, as he would never call on him for his amount: held, that if it be omitted in the schedule, the creditor cannot afterwards sue the insolvent for such debt, and it is not necessary to produce a copy of such schedule at the trial. A paper, purporting to be a copy of the original discharge of an insolvent, and signed by the clerk of the proper officer of that court, with the impression of the seal affixed to it, is admissible in evidence to prove such discharge, without the production of the certificate thereof, or proof of its being an examined or attested copy. *Carpenter v. White.* [3 Moore.] 231

INSURANCE.

1. Three underwriters, on a representation of a loss, pay their subscriptions, amounting to 600*l.*, into the hands of the broker, who, by their joint authority, pays over 300*l.* The loss turns out to be fraudulent, and one of the underwriters brings an action against the broker, to recover back his 200*l.*: held, that the broker was entitled to set off the 300*l.* paid over, against this demand, and that the court could not enter into the account to see what each party was entitled to, respectively: And, therefore, either that the other underwriters should have joined in the action, or the plaintiff should have resorted to a

court of equity. *Siba v. Linder, et al.* [2 Marsh.] 437

2. Where an insured, being indebted to the underwriter on a balance of accounts, becomes bankrupt, if a loss afterwards happen, the underwriter, in an action by the assignees, may deduct the balance due to him from the amount of his subscription. *Graham, et al., Assignees of Leigh, a Bankrupt, v. Russell.* [2 Marsh.] 561

3. In an action on a policy, where the defendant, by the mistake of his witness, failed in producing the necessary document from the admiralty, for proving a breach of the convoy act, the court granted a new trial, in order to let him into this defence, after verdict found for the plaintiff on the merits. *D'Aguilar v. Tobin.* [2 Marsh.] 265

L.

LANDLORD AND TENANT.

1. A declaration that in consideration that the defendant *had* become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon, and to keep the buildings in repair: held, bad on general demurrer; those obligations not arising out of the bare relation of landlord and tenant. *Brown v. Crump.* [1 Marsh.] 567
The landlord of premises, after notice to quit, brought an action of ejectment against the tenant, and obtained a verdict. The latter still continuing in possession, the landlord afterwards distrained on him for rent, which became due after the verdict, and which he paid: held, that the execution in the ejectment could not be stayed, as the tenant should have disputed the distress. *Doe, on the demise of Holmes v. Davies.* [3 Moore.] 581

N.

NEW TRIAL.

See INSURANCE, 3.

NOTICE OF JUSTIFICATION.

Bail by affidavit rejected, on the ground that one of them was described in the notice of justification as *A. B.* generally, but in the affidavit of justification as *A. B. the younger.* — *v. Meller.* [1 Marsh.] 386

NOTICE TO APPEAL.

See PRACTICE.

P.

PATENT.

Where a person obtains a patent for a machine, consisting of an entirely new combination of parts, though all the parts may have been used, separately, in former machines, the specification is correct in setting out the whole as the invention of the patentee: But if a combination of a certain number of those parts have previously existed up to a certain point, in former machines, the patentee merely adding other combinations, the specification should only state such improvements; though the effect produced be different throughout. *Bovill v. Moore, et al.* 211

PERFORMANCE, PLEA OF.

See PRACTICE.

PLEADING.

1. Where the substantial ground of action is *contract*, the plaintiffs cannot, by declaring in *tort*, render a person liable who would not have been liable on his promise: Therefore, where the plaintiff declared that, having agreed to exchange mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c.; held, that *infancy* was a good plea in bar. *Green v. Greenbank.* [2 Marsh.] 485
2. In a declaration of trespass for breaking and entering a house, the premises were laid in the parish of *Clerkenwell*. It was proved that *Clerkenwell* consisted of two parishes or districts, though it was generally known by the name of *Saint James, Clerkenwell*: held, an insufficient description. *Taylor v. Hooman.* [1 Moore.] 161
3. If a defendant, in an action on a recognizance of bail, under a judge's order to plead issuably, plead, *first*, *nil tiel record*, and *secondly*, that no *ca. sa.* was issued out against the principal: held, that such pleas might be considered as issuable, and that the plaintiff could not sign judgment as for want of a plea. *Hartley v. Hodson.* [1 Moore.] 410
4. If in an action of *assumpsit* improperly brought against an administratrix, she plead in abatement, that others were jointly liable, which she failed to prove, in consequence of which the plaintiff recovered a verdict with *ls.* damages: held, that such verdict did not amount to satisfaction, so as to bar the plaintiff from recovering against the other contractors. *Godson, gent. one, &c. v. Sir William Smith, bart. et al.* [2 Moore.] 157
5. The court will not set aside a declaration

against one defendant, the other having been outlawed, on the grounds that such outlawry was irregularly obtained, and that the declaration was delivered at the same time, as a bill of particulars, which was insufficient; and that another order was afterwards obtained for better particulars: as the application, by the defendant, who was in court by his bail, went to impeach the outlawry against the other, who was not before the court, and that as the defendant's attorney had not returned the declaration with the insufficient particulars he had waived the irregularity. *Solly, et al., v. Forbes and Ellerman.* [2 Moore.] 90

6. A rejoinder to a replication in trespass for stopping up a private way under an enclosure act, alleging that the commissioner did not direct the way to be stopped up, or give any orders relating to the same; or by his award, set out, or appoint any other way in lieu of it, is bad for duplicity. *White v. Reeves.* [2 Moore.] 23

PRACTICE.

See TENDER. LANDLORD AND TENANT. WRIT OF RIGHT.

1. The court will not entertain a motion for judgment as in case of nonsuit, pending a demurrer. *Butcher v. Kiernan.* [2 Marsh.] 364
2. A rule having been obtained for setting aside proceedings, the court refused to discharge it, on the ground that it had been obtained by a person not qualified to practise as an attorney; the defendant not being privy to the irregularity. *Harding v. Purkiss.* [2 Marsh.] 228
3. If the affidavit of the truth of a plea in abatement be insufficient, the court will not set aside the plea, as the plaintiff might have treated it as a nullity, and signed judgment. *Bray v. Haller.* [2 Moore.] 213
4. An action of debt was commenced in *Michaelmas* term against executors and a bond of their testator, conditioned for making it void on payment of a certain sum at a future day, or within one month after his decease, whichever should first happen, and a rule to plead was as of that term given. The defendants, in the following vacation, obtained a judge's order for time to plead, which they neglected to do, and final judgment was signed for want of a plea, which was set aside in the next *Hilary* term, on the defendants' undertaking to plead within a week, when they pleaded a judgment recovered against them as executors, which not being signed by a serjeant, the plaintiff again signed final judgment: held, first, that it was unnecessary to suggest breaches under the statute 8 & 9 W. & M. c. 11. s. 8; and secondly, that no rule to plead, as of *Hilary* term was necessary, nor was a demand of plea required. *Cardozo v. Hardy et al. executors of De Piza, deceased.* [2 Moore.] 220
5. The defendant may refer it to the prothonotary, before judgment, to ascertain what is due for principal and interest on a common money bond. *Bosworth v. Bosworth.* [3 Moore.] 590
6. The defendant having entered into a consolidation rule, and the plaintiff obtained a verdict on the cause tried, which was afterwards turned into a special verdict, to enable the defendant to remove it by a writ of error to the *King's Bench*, which was done, and bail put in accordingly. This court will stay execution in the action against the defendant, till the determination of the writ of error be known, on his giving security to be bound by the judgment of the *King's Bench.* *Gill et al. v. Hinckley.* [1 Moore.] 79
7. The plaintiff obtained a verdict in trespass against two defendants. Both were arrested on a joint *ca. sa.* for the amount of damages. One was discharged on giving a promissory note to the plaintiff, payable by instalments: held, that this operated to discharge the other. *Ballam v. Price and Payne.* [2 Moore.] 235
8. A defendant may move to set aside the service of a writ for irregularity, at any time before a new step is taken in the cause. *Dand v. Barnes.* [1 Marsh.] 403
9. A plaint was removed into this court by *re. fa. lo.* on the part of the defendants in replevin, tested on the 13th of *May*, and returnable on the 7th of *June*. There was no county court day between the teste and the return. No rule to declare was served on the plaintiff, or demand of declaration made. The defendant signed judgment of *non pro.* The court set it aside, as well as the subsequent proceedings, without costs, on the plaintiff's undertaking to declare on the *re. fa. lo.* *Ward (Widow) v. Creasey, et al.* [2 Moore.] 642
10. Proceedings set aside on the ground that the defendant, having two *Christian* names, issued by only one of them. *Arboun v. Willoughby.* [1 Marsh.] 477
11. The court will order interrogatories for the examination of a defendant in custody by one of the secondaries, which interrogatories must be filed with him. *Arnold v. Edwards, a prisoner.* [3 Moore.] 317
12. If a person in custody, at the suit of a third person, obtain a day rule, and execute a warrant of attorney at the office of the solicitor of the party to whom the instrument is to be given: held, that the presence of the prisoner's attorney is not necessary at the time of such execution. *Newbury v. Emmett.* [2 Moore.] 175
13. If a declaration against a prisoner is

- custody be delivered on the last day of the term in which the writ is returnable, the affidavit of the delivery need not be filed till twenty days after the expiration of the following term.
- If the month be omitted in the jurat of such affidavit, it is defective, and cannot be amended. *Wood et al. v. Stephens, a prisoner.* [3 Moore.] 236
14. If a tenant in possession leave this country, and reside abroad, for the purpose of avoiding his creditors, and the premises be charged with an annuity to the lessor of the plaintiff, to whom a right was reserved to enter, receive the rents, and sell: judgment cannot be obtained against the casual ejector, on an affidavit that a declaration was duly served on the premises, and a copy thereof affixed to the outer door; nor can the service of the declaration on the solicitor of such tenant be deemed good, unless he resided abroad for the express purpose of avoiding such service. *Roe, on the several demises of Fenwick and Powell v. Doe.* [3 Moore.] 576
15. A bailable, and not a *testatum capias*, was issued into *Durham*, and signed by the filazer for that county. The defendant was arrested, and put in bail as upon a *testatum*. A declaration was afterwards delivered, in which the venue was laid in *Lincolnshire*. A recognizance of bail was entered into in *Middlesex*, and a declaration on such recognizance was afterwards delivered, to which the defendant pleaded. On a motion to amend the entry of the recognizance from *London* to *Durham*: held, that the defendant having submitted to the arrest, and put in and got bail allowed, as upon a *testatum capias*, had waived the irregularity, and the court refused to interfere, but left the party to his ordinary remedy, and expressed their opinion that such writs ought not to issue in future. *Hartley v. Hodgson.* [1 Moore.] 514
16. The plaintiff had holden the defendant to bail, and a verdict was taken for him at the trial, subject to an order of reference for ascertaining the amount of the damages, and the arbitrator awarded a sum less than 1*l*. Upon an application to the court to allow the defendant his costs pursuant to 43 G. 3. c. 46: held, that in order to entitle the defendant to such costs, he must show that the arrest was vexatious and malicious. *Silversides v. Bowley.* [1 Moore.] 92
17. If a defendant be irregularly served with process, he may apply to set aside the proceedings, although the plaintiff may have entered an appearance for him, and served him with a notice of declaration and given him a rule to plead. *Ledwich, gent. one, &c. v. Prangnell.* [1 Moore.] 299
18. In the notice to appear at the foot of the process, it is not necessary that the year should be stated in words at length. *Kennington v. Anderson.* [1 Marsh.] 577
19. To debt on bond, the condition of which was, 'that A. B. should deliver a true account of all moneys received by him in pursuance of his office,' the defendant pleaded performance generally;—the plaintiff in his replication, assigned for breach, 'that A. B. was requested to deliver a true account of all moneys received by him in pursuance of his office, but refused so to do' held, on special demurrer, that this assignment of the breach was bad, in not alleging, 'that A. B. had received any moneys by virtue of his office.' *Serra et al. v. Fyffe.* [1 Marsh.] 441
20. Where a defendant is held to bail on a writ issued against himself and another, and the plaintiff declares against one only, the court will set aside the declaration and subsequent proceedings. *Jonge v. Murray et al.* [1 Marsh.] 274
21. An affidavit stating that the defendant had been discharged under an Insolvent Debtor's Act, cannot be sworn before his own attorney in the cause. *Jenkins v. Mason.* [3 Moore.] 325

R.

RECOVERY.

1. The court permitted a recovery to be amended by substituting the hamlet of *F.* in the parish of *A.* for the parish of *F.* *Willis, demandant; Calvert, tenant; Bartholomew, et ux., vouchers.* [1 Moore.] 131
2. In a deed to lead the uses, the lands were described as one hundred acres, more or less; a recovery was suffered for one hundred and ten; the court admitted it to be amended by increasing it to one hundred and twenty, as it would not augment such lands beyond the terms of the deed. *Gwynn, demandant; Heathcote, tenant; Camfield, vouches.* [2 Moore.] 163
3. A fine and recovery of *Easter*, 3 G. 1. were passed, of one hundred acres of land, thirty acres of meadow, fifty acres of pasture, ten acres of wood. In the deed to lead the uses, the estate was described as containing one hundred and seventy acres, more or less, and also a mill and lands, containing fourteen acres, more or less: and, in a prior deed, it was stated to contain two hundred acres, more or less. On a recent admeasurement, the estate appeared to contain two hundred and nine acres. The court refused an amendment to increase the quantity of land, according to the late survey, as

it exceeded the quantity in the deed to lead the uses; and held that, as the fine and recovery were passed so long since, it was necessary to account for the modern, as well as the ancient possession, and ascertain the successive possessors, and whether the estate had been divided or gone together, since the fine and recovery were passed. *Owen plaintiff, Owen et al., deforciant. Kenrick demandant, Owen tenant, Owen et al., vouches.* [3 Moore.] 70

4. A recovery may be amended by inserting the "great and rectorial tithes belonging to a manor," if they be contained in the deed to lead the uses, although the king's silver were not paid for such tithes, at the time the recovery was suffered. *White, demandant; Bicknell, tenant; Papillon, vouches.* [2 Moore.] 299
5. If a vouchee sign a recovery with one part of his Christian name only, the court will not permit the other part to be added. —, demandant: —, Tenant. *Bradley vouches.* [3 Moore.] 577
6. If a wrong surname of the demandant be inserted by mistake in the warrant of attorney, and subsequent instruments, the court will allow the recovery to pass, on the production of a new warrant of attorney rectifying such mistake, and on depositing the other instruments with the officer till that time. *Shepherd, demandant; Brewer, tenant; Shepherd, vouches.* [3 Moore.] 673
7. A recovery may be amended by adding a parish, though the recovery was suffered nearly a century ago, if there be general words in the exemplification, and deed to make the tenant to the *præcipe*, to warrant the insertion of such parish. *Anonymous.* [3 Moore.] 326
8. A recovery may be amended by substituting the parish of A. for B., if the deed to lead the uses comprehends all the estates of the demandant, situate in the county where such parishes lie. *Greenaway, vouches.* [2 Moore.] 237
9. The court will not allow a recovery to be amended by inserting a parish, if the property in the deed to lead the uses be described as a rectory, although such rectory may extend to more than one parish. —, demandant; *Orchard, tenant; Barnes, vouches.* [3 Moore.] 20
10. If the name of the tenant be inserted by mistake for that of the demandant in the body of a warrant of attorney in a recovery, the court will not allow the warrant of attorney to be amended, or the recovery to pass, although the parties were rightly described in the *præcipe* at the head of such warrant. *Morrell, demandant; Allen, tenant; Hutchell, vouches.* [3 Moore.] 495

RIGHT OF WAY.

See ENCLOSURE ACT.

8.

SHERIFF.

See ATTACHMENT AGAINST THE SHERIFF. PLEADING.

SHERIFF.

1. Where a defendant has been arrested by a wrong Christian name, and the sheriff returns, "I have taken A. B. sued by the name of C. B.," the sheriff is a trespasser; and the court will set aside an attachment issued against him for not bringing in the body. *The King v. The Sheriff of Surry, in a cause of Caffull v. Huntley.* [1 Marsh.] 75
2. Where the sheriff, on being ruled to return a writ, gave notice to the plaintiff that the writ was lost, and that the defendant was in custody; the plaintiff should have proceeded as if the sheriff had returned *cepi corpus*; and the court set aside an attachment issued against the sheriff for not returning the writ. *The King v. The Sheriff of Kent, in a cause of Read v. Hayward.* [1 Marsh.] 289
3. Where a rule to return a writ, issued out of this court, expires in vacation, the sheriff must file it at the return, and cannot wait till the ensuing term: *The Common Pleas* office being open during the vacation. *The King v. The Sheriff of Middlesex, in a cause of Thompson v. Powell.* [1 Marsh.] 270
4. Where the sheriff suffers a person, who has been arrested, to go at large without taking a bail-bond, the court will not suffer him to render the defendant after action commenced against him for an escape; though he should not have been ruled to return the writ or bring in the body, before action commenced. *Burra v. The Sheriff of Middlesex.* [2 Marsh.] 261

STATUTES.

- 8 Hen. 6. c. 9. s. 6. (See Costs.)
 5 Geo. 2. c. 30. s. 18. (See Assignee.)
 41 Geo. 3. c. 109. (See Enclosure Act.)
 (See Executor.)
 43 Geo. 3. c. 46. (See Practice.)
 43 Geo. 3. c. 58. (See Indictment.)

SURETY.

If a surety enter into a bond with a principal, conditioned for the performance of covenants contained in an agreement for a lease, such surety is still liable, al-

though the principal become bankrupt and be discharged under the 49 G. 3. c. 121. s. 19. *Inglis v. Macdougall*. [1 Moore.] 196

T.

TENANT.

See EXECUTION.

TENDER.

Where money is paid into court upon the common rule, the court will not discharge that part of it which directs the payment of costs, unless the defendant have been prevented from making a legal tender, by the fraud or vexatious conduct of the plaintiff: therefore, they refused the application, where the defendant had merely pulled out his pocket book, for the purpose of making a tender, six weeks before action brought, and was prevented by the plaintiff walking away; never having repeated the offer. *Last v. Benton*. [3 Marsh.] 478

TOLL.

By a grant of 22 Car. 2. to the Earl of Bedford, of a liberty to hold a market in Covent Garden, and to receive the accustomed dues and tolls, &c., to such market belonging, but to which no specific tolls were annexed: it seems that no tolls can be claimed, although such market be regulated as to tolls, &c., by a subsequent statute; and the jury having given a verdict on evidence, which did not show that any uniform tolls had been paid or collected, but that the defendant merely offered to pay a certain sum: the court granted a new trial, principally for another jury to say, whether, subsequent to the original charter, they could presume a new grant from the crown containing a specific right to tolls. *Lowden, et al. v. Hierons*. [2 Moore.] 102

TRESPASSER.

See SHERIFF.

TRIAL BY PROVISIO.

A defendant cannot go to trial by *provisio*, unless there have been a default on the part of the plaintiff, though there have been a former trial, and though the defendant gave notice to the plaintiff of his intention to carry down the record. *Worcestershire and Staffordshire Canal*

Company v. The Trent and Mersey Navigation Company. [1 Marsh.] 218

TROVER

In an action of trover, where the question was, whether goods were the property of the plaintiff alone or jointly with *I. S.*: held, that whether *I. S.* were admissible as a witness to prove this fact or not, yet, that as the plaintiff and *I. S.* had made joint orders for the disposition of the goods, the plaintiff alone could not recover. *Nathan v. Buckland*. [2 Moore.] 163

V.

VARIANCE.

A declaration on a bail-bond, in setting out the condition, stated, that if the defendant should appear to answer the plaintiff, "according to the custom of his Majesty's Court of Common Bench," here the obligation should be void. On the production of the bond, the former words were omitted: held, that this was no variance, as it was only necessary to set out the condition according to its legal effect. *Bonfellow v. Steward*. [3 Moore.] 214

VENUE.

See AFFIDAVIT.

In an action by an attorney for an escape, it is not a sufficient ground for deviating from the general rule not to change the venue in such case, that the witnesses on both sides reside in the county to which the venue is to be changed. *Pitcher, gent. v. The Sheriff of Monmouth*. [2 Marsh.] 152

W.

WARRANT OF ATTORNEY.

In order to obtain leave to enter up judgment on an old warrant of attorney, the affidavit must state that the defendant was alive on a day within the term in which the application is made. *Hamley v. Allanton*. [3 Moore.] 606

WARRANTY.

The plaintiff bought saffron of an inferior quality, which, having kept six months, and sold part, he then objected that the article was not saffron: held, in an action for a breach of warranty, that from

the length of time and inferior price given, it was such an article as the plaintiff intended to purchase. *Presser, et al. v. Hooper.* [1 Moore.] 106

to prove a particular fact, he leave the court, and the plaintiff is nonsuited for want of evidence. *Malcolm v. Day.* [3 Moore.] 579

WITNESS.

See ATTACHMENT. PRACTICE.

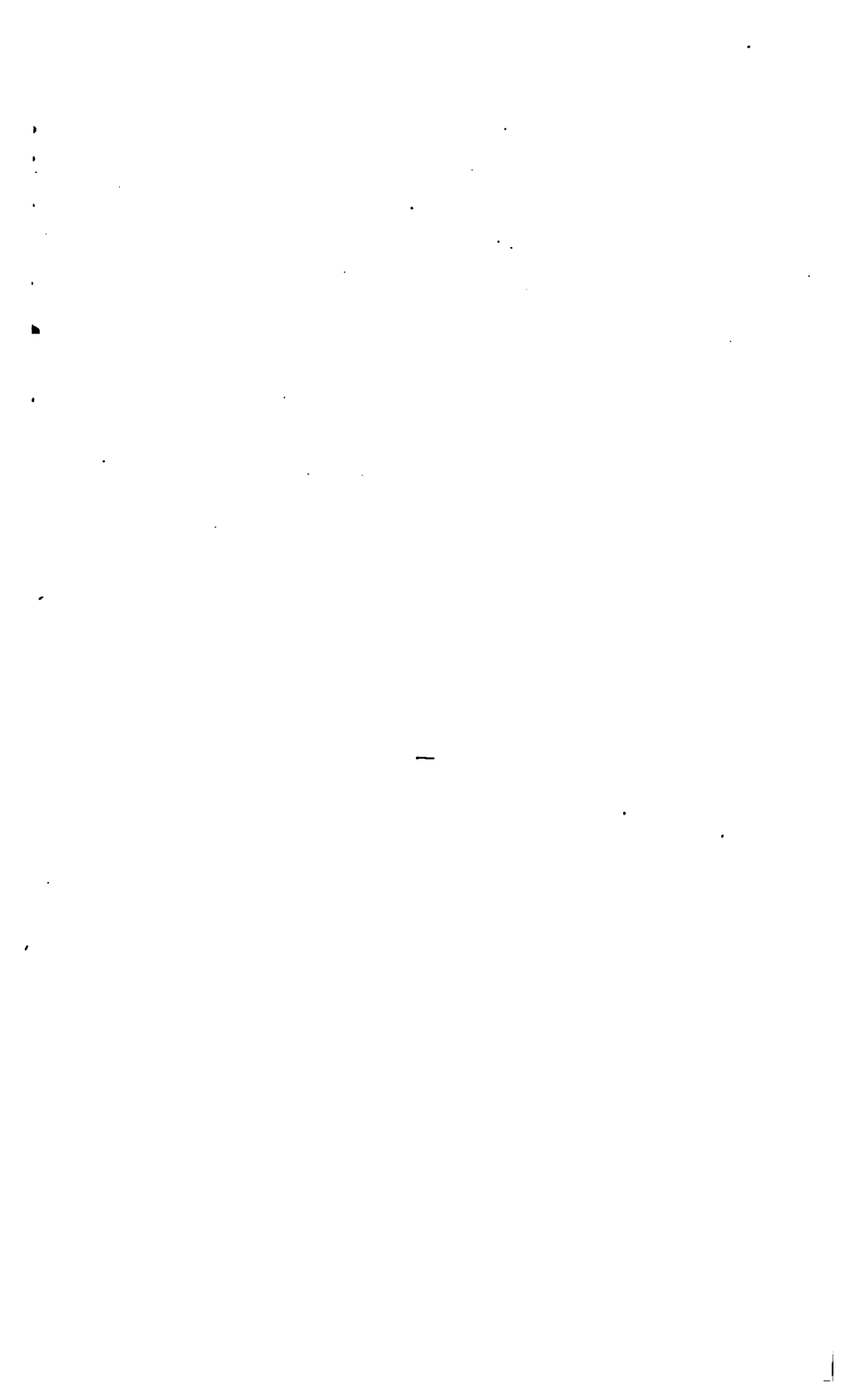
A witness is liable to an attachment, if, after a subpoena served on him, he attend in court, and during the opening of the plaintiff's cause, thinking he is not able

WRIT OF RIGHT.

The court will not assist the demandant in a writ of right; and, therefore, will not allow him to quash a writ of summons which has been irregularly executed. *Adams, demandant; Radway, tenant.* [1 Marsh.] 602

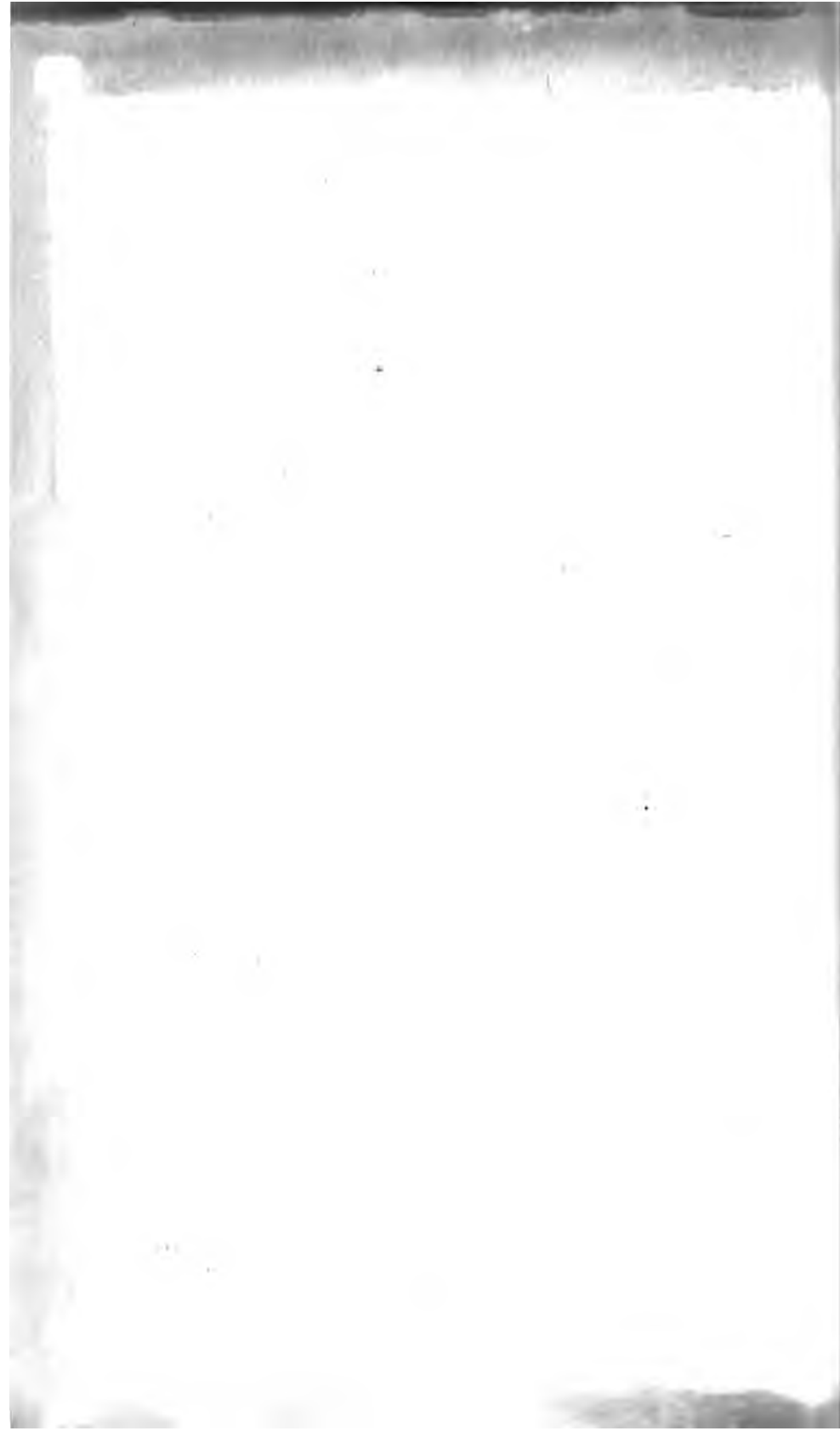












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